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No. 06-_____

IN THE
SUPREME COURT OF THE UNITED STATES

VILLAGE OF OLDE ST. ANDREWS, INC.;
WKB ASSOCIATES, INC.,

Petitioners,

v.

FAIR HOUSING COUNCIL, INC.;
CENTER FOR ACCESSIBLE LIVING, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Fair Housing Act, the "failure to design and construct" certain multifamily dwellings is unlawful discrimination against persons with physical disabilities. 42 U.S.C. § 3604(f)(3)(C). Respondents, public interest organizations, filed a civil action alleging that Petitioners built housing that does not comply with the Act's design and construction obligation.

1. Whether the injury in fact requirement for Article III standing is satisfied merely because a plaintiff incurred investigation and other pre-litigation expenses in preparation of filing the lawsuit.

2. Whether a continuing violation theory: (a) delays triggering the two-year statute of limitations in the Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A), until the date that the last unit in a housing development is sold or rented, regardless of when the unit was designed or constructed; or (b) allows suit against all prior sales of housing units, even if only a single sale occurs within the limitations period.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, the Village of Olde St. Andrews, Inc., and WKB Associates, Inc., are small businesses incorporated in the Commonwealth of Kentucky that are in the business of developing and building multifamily housing. The Village of Olde St. Andrews, Inc., is a subsidiary of WKB Associates, Inc. No public company owns more than ten percent of its stock.

Respondents are the Fair Housing Council, Inc., and the Center for Accessible Living, Inc., which are Kentucky non-profit corporations concerned with issues of housing discrimination and the development of housing that is accessible to the physically disabled.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

I. WKB's Condominium Projects, and Local Code Office Approvals 2

II. The HUD Funding Programs, and Respondents' Receipt of HUD Funds 4

III. The FHC's Use of "Testers" to Investigate WKB's Projects 6

IV. The District Court's Decision 7

V. The Court of Appeals' Decision 9

REASONS FOR GRANTING THE PETITION 11

I. THIS PETITION PRESENTS IMPORTANT QUESTIONS REGARDING THE INJURY IN FACT REQUIREMENT FOR ARTICLE III STANDING 11

A. Article III Standing Principles 11

1. The "irreducible constitutional minimum" 11

2. Organizational standing 12

B. The Court of Appeals Decided that a Plaintiff Sustains Article III Injury Simply by Spending Resources to Investigate and Prepare the Suit 14

C. The Circuits Conflict on Whether Litigation Preparation Expenses Provide the Basis for Article III Standing 16

1. Liberal Approach: Litigation expenditures, without more, comprise Article III injury 17

2. Strict Approach: Litigation expenditures do not comprise Article III injury 18

3. Middle Ground Approach: Lost opportunities from pursuing litigation comprise Article III injury 20

D. The Court of Appeals' Broad View of Article III Injury Contradicts This Court's Jurisprudence 22

II. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' ERRONEOUS STATUTE OF LIMITATIONS HOLDING 25

A. The Court of Appeals Incorrectly Decided that the Sale of the Last Housing Unit is the Triggering Event for Design and Construction Claims 26

B. There is Disagreement in the Lower Courts on the Triggering Event in Design and Construction Cases 29

C. The Court of Appeals' Decision Contradicts This Court's Understanding of the Term Discriminatory "Practice" 30

III. CONCLUSION 32

TABLE OF AUTHORITIES

Cases Page(s)

Alexander v. Riga, 208 F.3d 419 (3d Cir. 2000) 19

Allen v. Wright, 468 U.S. 737 (1984) 22

Ark. ACORN Fair Hous., Inc. v. Greystone Dev., Ltd., 160 F.3d 433 (8th Cir. 1998) 18

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) 13

Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health and Mental Retardation Ctr. Bd. of Trustees, 19 F.3d 241 (5th Cir. 1994) 20

Baker v. Carr, 369 U.S. 186 (1962) 13

Balt. Neighborhoods, Inc. v. Rommel Builders, Inc., 40 F. Supp. 2d 700 (D. Md. 1999) 29

DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854 (2006) 11, 22, 23

E. Paralyzed Veterans Ass'n, Inc. v. Lazarus-Burman Assocs., 133 F. Supp. 2d 203 (E.D.N.Y. 2001) 29

Edmond v. United States, 520 U.S. 651 (1997) 27

Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers, 141 F.3d 71 (3d Cir. 1998) 19

Flast v. Cohen, 392 U.S. 83 (1968) 22

Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 (1957) 27

Gladstone, Realtors v. Bellwood,
441 U.S. 91 (1979) 12

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) ..... *passim*

Hein v. Freedom From Religion Found.,
127 S. Ct. 2553 (2007) 11, 23

Hooker v. Weathers, 990 F.2d 913
(6th Cir. 1993) 8, 14

Hunt v. Wash. Apple Adver. Comm'n,
432 U.S. 333 (1977) 12

Ledbetter v. Goodyear Tire & Rubber Co., Inc.,
127 S. Ct. 2162 (2007) 31

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 11, 12, 16, 23

Mont. Fair Hous. v. Am. Capitol Dev., Inc.,
81 F. Supp. 2d 1057 (D. Mont. 1999) 29

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 27

Moseke v. Miller & Smith, Inc. 202 F. Supp. 2d
492 (E.D. Va. 2002) 29

Nat'l R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 30

Ragin v. Harry Macklowe Real Estate Co.,
6 F.3d 898 (2d Cir. 1993) 17

Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342 (1944) 28

Raines v. Byrd, 521 U.S. 811 (1997) 22-23

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 13, 23

Spann v. Colonial Vill., 899 F.2d 24 (D.C. Cir. 1990) 18, 19

United States v. SCRAP, 412 U.S. 669 (1973) 23

United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129 (D. Idaho 2003) 29

Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 22

Vill. of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990) 20, 21, 24

Walker v. City of Lakewood, 272 F.3d 1114 (9th Cir. 2001) 20

Warth v. Seldin, 422 U.S. 490 (1975) 22

Wilson v. Garcia, 471 U.S. 261 (1985) 28

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

U.S. Const. art. III, § 2 11

42 U.S.C. §2000 (e)-5(e)(1) 31

Fair Housing Act:

42 U.S.C. §3604(a) 21

42 U.S.C. §3604(b) 21

42 U.S.C. §3604(c) 17

42 U.S.C. §3604(d) 21, 24

42 U.S.C. §3604(f) 21

42 U.S.C. §3604(f)(1) 26, 27, 28

42 U.S.C. §3604(f)(3) 27
42 U.S.C. §3604(f)(3)(C) 27
42 U.S.C. §3604(f)(3)(C)(i) 2, 27
42 U.S.C. §3604(f)(3)(C)(ii) 2, 27
42 U.S.C. §3604(f)(3)(C)(iii) 2, 27
42 U.S.C. §3604(f)(7)) 2
42 U.S.C. § 3613(a)(1)(A) 8, 25, 30, 31

24 C.F.R. § 125.301(a) (1991) 4
24 C.F.R. § 125.401(a) (1991) 4

OTHER

Dash T. Douglas, *Standing on Shaky Ground: Standing Under the Fair Housing Act,* 34 Akron L. Rev. 613 (2001) 16

Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act,* 60 Mo. L. Rev. 547 (Summer 1995) 18

Fair Housing Initiatives Program, http://www.hud.gov/offices/fheo/partners/FHIP/fhip.cfm 4

TABLE OF APPENDICES

Page(s)

A. Constitutional and Statutory Provisions 1a

B. July 31, 2007 Letter from the U.S. Supreme Court, extending time to file Petition for Writ of Certiorari 3a

C. May 19, 2007 Order of U.S. Court of Appeals for the Sixth Circuit, denying motion to publish its December 15, 2006 Decision 4a

D. May 14, 2007 Order of the U.S. Court of Appeals for the Sixth Circuit 5a

E. December 15, 2006 Opinion of the U.S. Court of Appeals for the Sixth Circuit 7a

F. March 14, 2003 Memorandum Opinion and Order of the U.S. District Court for the Western District of Kentucky 38a

G. November 26, 2003 Affidavit of John Clark 64a

H. January 30, 2002 Plaintiff's Response to Defendants' First Interrogatories and Requests to Produce to Plaintiffs 67a

I. Excerpted Portions of the Deposition of Anthony Baize 101a

J. February 12, 1999 First Amended Complaint 154a

TABLE OF APPENDICES
(continued)

Page(s)

K. Illustration of the Dwellings and Aerial Photograph of the Greenhurst Development 172a

PETITION FOR A WRIT OF CERTIORARI

The Village of Olde St. Andrews, Inc. and WKB Associates, Inc. ("Petitioners"), respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 7a) is available at 210 Fed. Appx. 469, 2006 WL 3724128 (6th Cir. Dec. 15, 2006). It was not selected for publication in the Federal Reporter, and Petitioner's motion requesting publication was denied. App. 4a. The district court's opinion is unpublished. App. 38a.

JURISDICTION

The court of appeals issued its decision on December 15, 2006, and denied the petition for rehearing en banc on May 14, 2007. App. 5a. Justice Stevens extended the time to file this petition to and including September 26, 2007. App. 3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. III, § 2, limits federal judicial power to "Cases ... [and] Controversies." App. 1a.

Relevant provisions of the Fair Housing Act, 42 U.S.C. §§ 3604(f), 3613(a)(1)(A), are reproduced at App. 1a-2a.

STATEMENT OF THE CASE

The Fair Housing Act ("FHA") makes it unlawful to discriminate against physically disabled buyers and renters. In particular, section 804(f)(3)(C) provides that the "failure to design and construct" covered multifamily dwellings[1] is unlawful discrimination, if that housing does not satisfy explicit structural elements to allow for greater accessibility. 42 U.S.C. § 3604(f)(3)(C)(i)-(iii).

In this case, non-profit organizations seek to enforce the FHA's design and construction provisions. This petition seeks guidance as to whether the organizational plaintiffs satisfied Article III standing requirements, and whether certain of their claims are stale under the FHA's statute of limitations. Similar cases have generated conflicting opinions among the circuits, and here, the court of appeals resolved both issues in a manner that subverts and ignores this Court's precedent. Respectfully, the petition should be granted.

I. WKB's Condominium Projects, and Local Code Office Approvals.

Petitioner WKB Associates, Inc. ("WKB") is a residential development company based in Louisville, Kentucky. It has built three condominium projects in

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[1] "Covered multifamily dwellings" means "(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and (B) ground floor units in other buildings consisting of 4 or more units." 42 U.S.C. § 3604(f)(7).

Jefferson County, Kentucky—Greenhurst, The Village of Olde St. Andrews, and Deer Creek.

For each project, WKB purchased building plans from Epcon, Inc. (now Epmark, Inc.), which markets a pinwheel design for condominium developments. Each building consists of four dwellings connected by four garages. App. 172a-173a. To effectuate the designs for each project, WKB needed to obtain building approvals from the Jefferson County Code Enforcement Division ("Code Enforcement"). For example, regarding Greenhurst, the Epcon plans were initially submitted to Code Enforcement in 1993. WKB later retained an architect, Ken Brown, who reviewed and altered the Greenhurst plans and submitted the revisions to Code Enforcement in September 1994. The county then issued building permits, allowing WKB to construct 156 units at Greenhurst. Of these, only the last three remaining units were sold within two years before the date Respondents filed their amended complaint. See *infra* pp. 25-26; App. 28a.

Epcon's plans included "handicap accessibility notes" setting forth the FHA's accessibility requirements. These were attached to some of the plans filed with Code Enforcement. According to John Clark, an inspector employed with Code Enforcement since 1984, he "did not know that it was necessary" to incorporate these notes into WKB's projects; he thought that accessibility features were only required for projects "produced by the Department of Housing and Urban Development." App. 65a. Indeed, at least as of November 26, 2002 (the date Clark signed his affidavit), the County's

code enforcers "ha[d] not advised builders such as WKB" of the FHA's design and construction obligation. *Ibid.* Thus, Code Enforcement made no reference to the accessibility notes in its responses to any of WKB's plans.

II. The HUD Funding Programs, and Respondents' Receipt of HUD Funds.

HUD's Office of Fair Housing and Equal Opportunity ("OFHEO") administers the Fair Housing Initiative Program ("FHIP"), to support organizations working on fair housing issues. Under the FHIP Private *Enforcement* Initiative, HUD provides funds "to investigate violations and obtain enforcement of the rights granted under the Fair Housing Act" and similar state or local laws. 24 C.F.R. § 125.401(a). Grantees use Private Enforcement Initiative funds to hire and train "testers"[2] to investigate housing discrimination, and initiate litigation against non-compliant housing discovered through tester investigation. In addition, HUD's *Education* and Outreach Initiative provides funding for "programs designed to inform members of the public concerning their rights and obligations under the provisions of fair housing laws." 24 C.F.R. § 125.301(a).

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[2] HUD's website describes testers as "minorities and whites with the same financial qualifications who evaluate whether housing providers treat equally-qualified people differently." Fair Housing Initiatives Program, http://www.hud.gov/offices/fheo/partners/FHIP/fhip.cfm (last visited Sept. 20, 2007).

Respondents, the Fair Housing Council, Inc., ("FHC") and the Center for Accessible Living ("CAL"), are Kentucky non-profit corporations concerned with housing discrimination issues. In 1997 and 1998, prior to bringing this lawsuit, HUD funded the FHC through two FHIP grants. The FHC's corporate representative acknowledged that "[f]or the most part" this litigation has been underwritten by HUD enforcement dollars. Deposition of Tony Baize ("Baize Depo."); App. 143a. Indeed, HUD funding comprised around 90% of the FHC's total budget. *Id.*; App. 133a.

The FHC received HUD monies to engage in both fair housing "enforcement" and "education." "Enforcement" activities included: litigating; conducting tests and investigations to find and document housing discrimination; and processing complaints. "Education" included creating and administering the www.fairhousing.com website; publishing a newsletter, the *National Fair Housing Advocate*; and making presentations at annual events. Plaintiffs' Responses to Defendants' First Interrogatories ("Interrogs.") ##4, 10; App.74a-75a, 80a-82a.

On December 1, 1997, HUD awarded a $349,997.00 enforcement grant to the FHC, $189,581.73 of which was applied to years 1997 and 1998. Interrog. #11; App. 83a-84a. This constituted 70% of FHC's total funding for these years (*id.*; App. 84a), and supported three of the FHC's five staff members. See Interrog. #14 (App. 85a-88a); Baize Depo. (App. 114a-116a). The FHC also received a FHIP education grant from HUD, accounting for 30% of the organization's funding during 1997 and 1998.

Interrog. # 12; App. 85a. The total education funding for this period was $81,797.17. Of this, $16,255.00 was the residual amount of a grant commencing September 28, 1995, for the purpose of establishing the FHC website. By September 15, 1998, the FHC had exhausted its education funding. Interrogs. ##12, 13; App. 84a-85a.[3]

Thus, between September 1998 and 2001, the FHC only had designated money remaining for enforcement purposes. Subsequently, in 2001 and 2002, after partnering with the CAL to obtain more federal dollars, the FHC was again funded by HUD through a $600,000.00 enforcement grant and a $96,000.00 education grant. Baize Depo.; App. 148a-150a.

III. The FHC's Use of "Testers" to Investigate WKB's Projects.

"Testing is performed on a systemic basis, as a component of a pattern or practice investigation ...." Interrog. #9; App. 79a. In 1997, as required by its HUD grant,[4] the FHC searched for FHA violations in the Louisville region. To locate non-compliant

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[3] When HUD did not award a FHIP education grant to the FHC, it had to stop publishing the *National Fair Housing Advocate*. Publication stopped in November 1998. Baize Depo. (App. 134a); Interrog. #10 (App. 80a). Since then, the FHC has published only one other edition. Baize Depo.; App. 150a.

[4] The Budget Narrative Work Plan for the FHC's 1997 enforcement grant provides that the HUD disbursement earmarked $7,650 to hire testers for 255 tests. App. 23a, n.3.

properties, the FHC would "require[ ] a tester to go to a site, and, basically, eyeball the property to ... look for violations .... Essentially, we go for any new multi-family housing that we see going up." Baize Depo.; App. 110a. The CAL simply provided the testers, which the FHC then hired. *Id.*, App. 104a-105a.

The FHC initially targeted The Village of Olde St. Andrews because the steps in front of the homes there caught the testers' attention. *Id.*, App. 103a. The FHC would pay testers $25 each for training, and $25 per actual test. Interrog. #9; App. 79a. Testers performed site surveys at Olde St. Andrews between August 17, 1998 and September 1, 1998. Baize Depo. (App. 104a-105a); Interrog. #8 (App. 76a-78a). Prior to the investigation and this lawsuit, the FHC received no complaints from purchasers or potential purchasers of homes developed by WKB. Interrogs. ##5, 6; App. 75a-76a.

Based on its testing work, on October 6, 1998, the Respondents filed a complaint against WKB alleging FHA violations at The Village of Olde St. Andrews. Subsequently, Respondents hired an expert to conduct on-site investigations not only at Olde St. Andrews, but also at Greenhurst and Deer Creek. As a result, on February 12, 1999, Respondents amended their complaint to include allegations against Greenhurst and Deer Creek. App. 154a.

IV. The District Court's Decision.

WKB moved for summary judgment on standing grounds. The district court found that the FHC offered no proof to support its claim that it suffered

injury due to a diversion of organizational resources. App. 52a-53a. However, whether the FHC was injured by spending money on tester investigation was "a much closer question" for the district court. It analyzed the varying opinions among the circuit courts of appeals, as to whether litigation preparatory costs can provide the basis for standing. App. 46a-49a. It grudgingly relied on *Hooker v. Weathers*, 990 F.2d 913 (6th Cir. 1993), to find standing based on investigation expenses: "If it were not for the *Hooker* opinion, the [district] [c]ourt would almost certainly conclude that the pre-litigation investigation in this case is insufficient to establish standing under Article III." App. 55a.

WKB also moved for summary judgment on statute of limitations grounds regarding the claims against the Greenhurst development. The district court decided that the act which triggered the FHA's two-year statute of limitations, 42 U.S.C. § 3613(a)(1)(A) (App. 1a), "is the design and construction of covered multi family dwellings .... 'The proper emphasis here must remain on Defendant's act (*i.e.*, the design and construction of non-compliant buildings)' ...." App. 59a (citation omitted). But then, in the next breath, the district court switched focus to the act of *selling* units, and applied the "continuing violation doctrine" to conclude the limitations period begins to run "as to the *entire* development when the last unit is sold." App. 60a (emphasis supplied). In other words, *all* of Greenhurst's 156 units were subject to the FHA, even though only three dwellings were sold within the two-year limitations period.

V. The Court of Appeals' Decision.

The court of appeals also acknowledged that the "circuit courts differ ... on the extent to which they will consider injury related to litigation in reviewing standing." App. 16a. It explained it follows the "lenient approach," that "prelitigation investigation can form the basis for standing." App. 19a. Consequently, after stating it was not free to overrule *Hooker*, the court of appeals rejected WKB's argument that the FHC sustained no injury by investigating, hiring testers, and litigating to satisfy HUD's requirements as a recipient of federal grants. It decided that the FHC's receipt of HUD enforcement dollars "does not mean that the use of a portion of those funds to investigate WKB properties does not amount to a concrete injury." App. 23a.[5] The court of appeals further rationalized:

> In our world of scarce resources, every expenditure of money, time or other resources results in the loss of the benefit that would have resulted if the same time or money had been spent on something else. If the [FHC] had not expended time and money on testing at Olde St. Andrews, it could have used those monies for other testing.

App. 24a. With respect to the CAL, the court of appeals disagreed with the district court and found no

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[5] The court of appeals did not find exactly how much money the FHC spent on testers to investigate WKB properties. It must have been in the range of $150—three testers hired at $50 each, at $25 for training and $25 for the actual test. See Interrog. #9; App. 79a.

standing because its injury was "limited to its time spent rounding up three testers." App. 27a.

In a concurring opinion Judge Ryan wrote that, but for *Hooker*, he would not have found the FHC had standing:

> It strikes me as obvious that a non-profit corporation created for the purpose, *inter alia*, of bringing lawsuits to enforce the FHA, has not suffered a "concrete and demonstrable *injury* to [its] activities," (emphasis added), simply by conducting one of its activities—finding suable defendants. But *Hooker* has held otherwise, and it is a binding precedent ....

App. 36a. Judge Cook concurred *only* in Judge Ryan's opinion. App. 37a.

Finally, the court of appeals found that Respondents' claims were timely regarding Greenhurst. It decided that if an owner has built several housing developments that do not comply with the FHA's design and construction requirements, "the continuing violation doctrine may toll the running of the limitations period until the last unit of all the implicated developments is sold." App. 33a. Thus, because three of the Greenhurst dwellings were sold within the limitations period, the court of appeals held that claims against *all* units were timely.

REASONS FOR GRANTING THE PETITION

I. THIS PETITION PRESENTS IMPORTANT QUESTIONS REGARDING THE INJURY IN FACT REQUIREMENT FOR ARTICLE III STANDING.

A. Article III Standing Principles.

Federal judicial power is restricted to deciding "Cases" and "Controversies." U.S. Const. art. III, § 2. "'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Hein v. Freedom From Religion Found.*, 127 S. Ct. 2553, 2562 (2007) (citations omitted). One of Article III's "core component[s]" is standing, "an essential and unchanging part of the case-or-controversy requirement ...." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). See also *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006) (standing "'enforces the Constitution's case-or-controversy requirement'") (citations omitted).

1. The "irreducible constitutional minimum."

The "irreducible constitutional minimum" for standing is well-established:

> First, the plaintiff must have suffered an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized ...; and (b) "actual or imminent, not 'conjectural or

> hypothetical,'" .... Second, there must be a causal connection between the injury and the conduct complained of .... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560 (1992) (citations omitted). The case at bench addresses the first element—injury in fact. More specifically, this petition seeks guidance on whether pre-litigation expenses incurred by an organization can satisfy the injury requirement for Article III standing.[6]

2. Organizational standing.

There are two recognized tests for organizational standing. First, an organization can show "representational standing" to litigate as a surrogate on its members' behalf. See *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The *Hunt* test is not at issue here. Rather, Respondent FHC seeks standing in its own right as a first-party litigant. As *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) explains, an organization can sue

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[6] Aside from Article III prerequisites, the Court has imposed prudential standing limitations to "avoid deciding questions of broad social import where no individual rights would be vindicated." *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 99-100 (1979). The Court has ruled that "the normal prudential rules do not apply [under the FHA]; as long as plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed." *Id.* at 103, n. 9. See also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

"under the same inquiry as in the case of an individual: Has the plaintiff '"alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction'?" *Id.* at 378-379 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). See also *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (plaintiffs "allege[d] no injury to themselves as organizations" and thus lacked first-party standing).

In *Havens*, a non-profit organization called "HOME" sued real estate brokers for FHA violations. HOME pressed its rights for damages caused by "racial steering," a practice that preserves segregated living patterns by encouraging tenants to live in apartment buildings predominantly occupied by persons of their own race. HOME did not itself (nor did any of its members) intend to lease an apartment. Nonetheless, the Court found that HOME sufficiently alleged Article III injury to survive a motion to dismiss. The complaint stated that the brokers' steering practices "frustrated" HOME's efforts to combat discrimination and assist in ensuring "equal access to housing through counseling and other referral services." *Havens*, 455 U.S. at 379. HOME also alleged it had to "devote significant resources to identify and counteract" the defendants' conduct. *Ibid.* The Court found these allegations were enough at the motion to dismiss stage:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home seekers, there

> can be no question that the organization has suffered injury in fact. *Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests* ....

Id. at 379 (emphasis supplied). While HOME survived a motion to dismiss, the Court emphasized that, at trial, the organization needed to demonstrate "it has indeed suffered impairment in its role of facilitating open housing ...." *Id.* at n. 21.

B. The Court of Appeals Decided that a Plaintiff Sustains Article III Injury Simply by Spending Resources to Investigate and Prepare the Suit.

The court of appeals considered the "drain on resources" language from *Havens* quoted above, and acknowledged that the circuits have fallen into conflict "on the extent to which they consider injury related to litigation in reviewing standing." App 16a. Following its own precedent, the lower court decided "that costs related to pre-litigation investigation can form the basis for standing." App. 19a. It chiefly relied on *Hooker v. Weathers,* 990 F.2d 913 (6th Cir. 1993), as "[h]olding that the act of sending a tester to investigate ... claims of discrimination was sufficient to confer standing" upon an organization that "'devoted resources to investigating the defendants' practices.'" App. 20a (citing *Hooker,* 990 F.2d at 915). Applying *Hooker*, the court of appeals concluded "the resources that [Respondent FHC] directed toward

training and employing testers to investigate the Village of Olde St. Andrews constitutes a concrete injury." App. 26a.

The lower courts adopted a reluctant, almost apologetic, tone to justify their reliance on *Hooker*. The court of appeals rationalized that *Hooker* "remain[ed] controlling authority" unless overruled through en banc review or reversed by this Court. App. 21a (citation omitted). Two members of the three-judge panel regretted that *Hooker* controlled the outcome. Judge Ryan wrote a separate concurrence to emphasize that "[w]ere it not for *Hooker* ... I would hold that [FHC] does not have Article III standing to maintain this lawsuit." App. 36a. Judge Cook joined in the concurring opinion "only." App. 37a. The district court felt similar constraints: "If it were not for the *Hooker* opinion, the [c]ourt would almost certainly conclude that the pre-litigation investigation in this case is insufficient to establish standing under Article III." App. 55a.

There is no evidence in the record—not in any interrogatory response (App. 67a-100a) or deposition testimony (App. 101a-153a)—showing that FHC suffered some present, tangible injury separate and apart from its costs to investigate and file this specific suit.[7] Neither the appellate nor district courts found

[7] The standing issue in this case first presented itself at the summary judgment phase, not on a motion to dismiss as in *Havens*. App. 44a, 63a. Accordingly, mere allegations are not enough at this juncture, and Respondent FHC bears the burden to set forth by affidavit or other evidence specific facts to satisfy

any concrete proof of harm other than pre-litigation tester expenses. The only injury the court of appeals could muster was that FHC lost purported opportunities to combat some other unknown, unidentified instances of discrimination not attributable to Petitioners: "If [FHC] had not expended time and money on testing at Olde St. Andrews, it could have used those monies for other testing." App. 24a.

In short, the court of appeals believed that "an organization suffers a concrete injury sufficient to confer standing when it devotes resources to training and deploying testers to investigate" the very conduct that culminates in the lawsuit. App. 23a.

C. The Circuits Conflict on Whether Litigation Preparation Expenses Provide the Basis for Article III Standing.

There is manifest conflict in the Courts of Appeals on whether pre-litigation expenditures provide the injury basis for standing. The court below catalogued the variant approaches taken by its sister circuits (App. 16a-19a), and selected the broadest of the extant interpretations of *Havens*'s "diversion of organizational resources" language. See also Dash T. Douglas, *Standing on Shaky Ground: Standing Under the Fair Housing Act*, 34 Akron L. Rev. 613, 626-630 (2001) (analyzing the circuits' "[l]iberal," "[s]trict," and "[m]iddle ground" interpretations of *Havens*). If

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Article III standing prerequisites. *Lujan*, 504 U.S. at 561 (citations and quotation marks omitted).

the Court further postpones review, the random circumstance of the circuit where suit is filed will determine which plaintiffs do, or do not, obtain federal court review. Forum shopping would be encouraged. Respectfully, this Court must provide a uniform answer to the significant Article III question presented herein.

1. **<u>Liberal Approach:</u> Litigation expenditures, without more, comprise Article III injury.**

In deciding that pre-litigation investigation expenses incurred by Respondent FHC met the standing injury requirement, the court of appeals aligned itself with the Second and Eighth Circuits. In *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993), a fair housing organization was among the plaintiffs that filed suit under FHA § 804(c), 42 U.S.C. § 3604(c), challenging discriminatory housing advertisements that only depicted white models; persons of color were not portrayed in certain ads extolling upscale Manhattan apartments. Relying on *Havens,* the court found "perceptible impairment" of the organization's fair housing objectives. *Id.* at 905. As evidence of that injury, the Second Circuit relied on trial testimony of the organization's deputy that "she and her small staff devoted substantial blocks of time to investigating and attempting to remedy the defendants' advertisements," such as by filing an administrative complaint, identifying developers and marketing agents, and attending a "conciliation conference." *Ibid.* "That some of the ...staff's time was spent exclusively on litigating this action does not deprive the organization of standing to sue in

federal court." *Ibid.* Like the Second Circuit in *Ragin,* the Eighth Circuit has decided that a plaintiff's "monitoring and investigation" of the suit's underlying bases "is itself sufficient to constitute an actual injury ...." *Ark. ACORN Fair Hous., Inc. v. Greystone Dev., Ltd.,* 160 F.3d 433, 434-35 (8th Cir. 1998).

In short, the court of appeals joined the Second and Eighth Circuits in reading *Havens* broadly and conferred standing on a litigant—just because it spent money to litigate.

2. Strict Approach: Litigation expenditures do not comprise Article III injury.

"[A]s an interpretation of the decision of the Supreme Court in *Havens Realty,* the decision of the Second Circuit [in *Ragin*] is hardly a tour de force." Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act,* 60 Mo. L. Rev. 547, 586 (Summer 1995). Accordingly, other courts have rejected the approach of the Second, Sixth, and Eighth Circuits. In *Spann v. Colonial Vill.,* 899 F.2d 24 (D.C. Cir. 1990) (Bader Ginsburg, J.), the D.C. Circuit interpreted *Havens* and considered discriminatory advertising under the same FHA provision, Section 804(c), that the Second Circuit analyzed in *Ragin.* Yet, it reached the exact *opposite* conclusion:

> An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were

> the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation.

Id. at 27. The *Spann* court interpreted *Havens* as conferring standing only where an organization "increases the resources the group must devote to programs *independent of its suit* challenging the action." *Ibid* (emphasis supplied).[8]

The Third Circuit has explicitly endorsed *Spann*. See *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers,* 141 F.3d 71, 79-80 (3d Cir. 1998): "[T]he pursuit of litigation alone cannot constitute an injury sufficient to establish standing under Article III."[9] Because the organizational plaintiff "did not devote time and resources to legal efforts short of litigation," it lacked standing. *Id.* at 80, n.7.

Citing both *Spann* and *Montgomery Newspapers,* the Ninth Circuit "agree[s] that a plaintiff cannot establish standing by filing its own lawsuit ...." *Walker v. City of Lakewood,* 272 F.3d 1114, 1124 (9th

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[8] The *Spann* court found its standard had been met. To combat preferential advertising, the organizational plaintiffs "devote[d] more time, effort, and money to ... educate" minority home buyers and renters, real estate professionals, and the public, about housing discrimination. *Spann,* 899 F.2d at 27.

[9] On another occasion the Third Circuit indicated that an organizational plaintiff might have standing where it "stopped everything else" and diverted *all* of its resources to the subject lawsuit. *Alexander v. Riga,* 208 F.3d 419, 427 n.4 (3d Cir. 2000).

Cir. 2001). Likewise, the Fifth Circuit similarly held that a public interest group did not demonstrate Article III impairment simply due to litigation costs: "The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health and Mental Retardation Ctr. Bd. of Trustees,* 19 F.3d 241, 244 (5th Cir. 1994).

The court of appeals cited all of these cases and categorized them under the "more restrictive approach, holding that to show standing an organization must demonstrate that it suffered a concrete injury that is *completely independent* from the economic and non-economic costs of the litigation." App. 16a-17a (emphasis supplied). By refusing to adopt the analyses of the D.C., Third, Fifth and Ninth Circuits, the court of appeals widened the judicial divide.

3. Middle Ground Approach: Lost opportunities from pursuing litigation comprise Article III injury.

Inventorying the variant circuit holdings, the lower court also considered *Vill. of Bellwood v. Dwivedi,* 895 F.2d 1521 (7th Cir. 1990) (Posner, J.). *Dwivedi,* like *Havens* and this case, involved an organizational plaintiff's use of testers to smoke-out

possible FHA violations.[10] The Seventh Circuit found that the organization had standing due to the "deflection of ... time and money from counseling to legal efforts directed against discrimination. These are *opportunity costs of discrimination*, since although the counseling is not impaired directly *there would be more of it* were it not for the defendant's discrimination." *Id.* at 1526 (emphasis supplied).

Under the Seventh Circuit's "opportunity cost" approach to standing, but for the resource demands necessary to bring the lawsuit, the organizational plaintiff could have devoted more energy toward other fair housing activities. *Dwivedi* differs from the liberal approach adopted by the court of appeals and the Second and Eighth Circuits, because it does not find standing injury simply based on litigation expenses but rather on prospects foregone as a result of pursuing the suit at hand. *Dwivedi* also differs from the strict approach adopted in the D.C., Third, Fifth and Ninth Circuits, because it does not demand affirmative organizational expenditures toward activities independent of the lawsuit. Rather, *Dwivedi* hinges on *the lack* of expenditures, focusing

[10] But the particular FHA violation in each case differs. This matter concerns Section 804(f), regarding the design and construction of housing inaccessible to the physically disabled. 42 U.S.C. § 3604(f). *Havens* concerned misrepresentation of housing opportunities prohibited by Section 804(d), *id.* § 3604(d). *Dwivedi* considered Section 804(a), which forbids making a dwelling unavailable to the Act's protected groups (*id.* § 3604(a)), and Section 804(b), outlawing discrimination in the provision of services for the sale or rental of housing. *Id.* § 3604(b).

on efforts an organization *would have* pursued but could not due to insufficient funds.

So, what is the rule? Is Article III standing conferred on a plaintiff because of the money spent on suing? Or, must a plaintiff demonstrate injury independent of litigation expenses? Does a plaintiff sustain sufficient Article III injury because it decides to sue, at the expense of other lost opportunities? There is evident discord in the circuits' analyses that only this Court can resolve.

D. The Court of Appeals' Broad View of Article III Injury Contradicts This Court's Jurisprudence.

The purpose of Article III is to restrict the prerogatives of the federal courts. See, *e.g.*, *Cuno*, 126 S. Ct. at 1860 ("Article III ... assumes particular importance in ensuring that the Federal Judiciary respects '"the proper—and properly limited—role of the courts in a democratic society."' (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984), quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The "case-or-controversy limitation is crucial in maintaining the '"tripartite allocation of power"' set forth in the Constitution." *Cuno*, 126 S. Ct. at 1861 (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982), quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). '"'[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."'" *Cuno*, 126 S.Ct. at 1861 (quoting *Raines v. Byrd*, 521 U.S.

811, 818 (1997), quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)).

The court of appeals' decision disserves these time-honored principles. Far from limiting the judiciary's role, the opinion below dramatically expands Article III powers. It is impossible to imagine an instance in which an organization like the FHC would not have standing under the lower court's reasoning; *all* plaintiffs could invoke federal court jurisdiction because they necessarily spend time, money, and effort to prepare their lawsuits. The injury in fact element could be manufactured *every* time. Standing would thus be relegated to merely "'an ingenious academic exercise in the conceivable.'" *Lujan*, 504 U.S. at 566, quoting *United States v. SCRAP*, 412 U.S. 669, 688 (1973)).

Consider those cases where plaintiffs were found to lack standing. The taxpayers in *Hein*, 127 S. Ct. 2553, surely conducted pre-litigation research into conferences funded by the Bush Administration's faith-based initiatives. Likewise, the taxpayers in *Cuno*, 126 S. Ct. 1854, must have spent resources prior to filing suit so they could analyze the contract between the City of Toledo and DaimlerChrysler Corporation. And, the environmental organizations in *Lujan*, 504 U.S. 555, certainly incurred expenses investigating federal agencies' international projects and assessing their impacts on endangered species. In each case, the Court found the plaintiffs' respective injuries too generalized and remote. Yet, if the court of appeals' decision holds sway, the *Hein*, *Cuno*, and *Lujan* plaintiffs all would have had standing. Their

pre-litigation investigation expenses would satisfy Article III injury in fact—under the suspect ruling.

Moreover, the holding below greatly distorts this Court's narrow recognition of tester standing in *Havens*. "The standing of the testers is, as an original matter, dubious. They are investigators; they suffer no harm other than that which they invite in order to make a case against the person investigated ...." *Dwivedi*, 895 F.2d at 1526. In *Havens*, the Court found that Congress "conferred on all 'persons' a legal right to truthful information about available housing" under FHA Section 804(d), 42 U.S.C. § 3604(d). 455 U.S. at 373. Thus, an African American tester had standing because a broker lied to her about housing opportunities—but a white tester did not have standing because he did not receive false information. *Id.* at 374-75. This Court has never recognized tester standing outside of this narrow context. In the case at bench, the testers did not receive untruthful housing information; they had no intent to rent or buy one of Petitioners' homes; and they were not even members of Respondent FHC. Allowing the FHC to sue here stretches *Havens*'s endorsement of testers beyond all recognition.

The FHC's insistence that it has suffered concrete injury is utterly suspicious, given that the source for its tester funding was the same money it received through enforcement grants from HUD. How could the FHC possibly be injured by investigating a claim when, as a condition to receiving a federal grant, it must spend those very dollars on investigation? According to the Budget Narrative Work Plan for the 1997 enforcement grant, HUD awarded the money to

the FHC *precisely* for the purpose of tester investigations. *Supra* p. 6 n.4. If the FHC didn't conduct the investigations then it would have lost the grant. And, if it didn't receive the HUD award then it would have had no resources to investigate WKB's projects. Finding standing in these circumstances, while the FHC runs its own litigation mill, makes a mockery out of Article III.

Of course, physically disabled persons can readily show standing when they are the objects of illegal discrimination. Likewise, the non-profit organizations legitimately representing them must be given fair litigation opportunities to achieve the FHA's broad remedial goals. Standing should not be an onerous bar to hurdle, but there must be *some* bar. Otherwise, the case-or-controversy requirement is rendered meaningless. With respect, the Court should grant this petition to restore the limits on judicial power imposed by Article III and the injury in fact requirement that derives from it.

II. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' ERRONEOUS STATUTE OF LIMITATIONS HOLDING.

The court of appeals also afforded an unduly expansive—and ultimately wrong—interpretation to the FHA's statute of limitations.

42 U.S.C. § 3613(a)(1)(A) states that a civil action can be brought within two years "after the occurrence or the termination of an alleged discriminatory housing practice ...." App. 1a. On February 12, 1999, Respondents filed their amended complaint, which

included claims against Petitioner's Greenhurst project. App. 157a-163a. This 1999 filing occurred more than two years after Petitioners completed construction at Greenhurst, in 1995. App. 28a. Nonetheless, the court of appeals found the design and construction claim timely.

A. The Court of Appeals Incorrectly Decided that the Sale of the Last Housing Unit is the Triggering Event for Design and Construction Claims.

In construing section 813(a)(1)(A), the court of appeals thought "it makes little practical sense to start the limitations period running from the date of completion of the design and construction." App. 31a. Instead, it decided that "the discriminatory act occurs during the sale or rental of that unit. Thus, once a unit has been sold or rented, the discriminatory act is complete." *Ibid.* The court of appeals relied on section 804(f)(1) as the controlling "catch-all provision" (App. 32a), which generally makes it unlawful "[t]o discriminate in the sale or rental [of] ... a dwelling ... to any buyer or renter because of a handicap ...." 42 U.S.C. § 3604(f)(1); App. 1a. Although Petitioner finished construction at Greenhurst in 1995, it sold the last three dwellings there in 1997—within two years of the date Respondents' filed their amended complaint in 1999. The lower court then decided that *all* units at Greenhurst were subject to the FHA, because "*the continuing violation doctrine* applies to toll the statute of limitations until the sale of the last unit in that development." App. 33a (emphasis supplied).

In concluding that the last unit sale triggers the FHA's two-year requirement, the court of appeals failed to give appropriate weight to 42 U.S.C. § 3604(f)(3)—the section that *describes* the very type of discrimination that § 3604(f)(1) prohibits. Section (f)(3) is tailored "[f]or purposes" of section (f)(1), and includes the "failure to design and construct" covered dwellings in an accessible manner. *Id.* § 3604(f)(3)(C); App. 1a-2a. Subsections 804(f)(3)(C)(i)-(iii) then set forth detailed structural elements that such housing must incorporate: ensuring accessible routes to and through common areas; providing sufficiently wide doors for wheelchair passage and reinforced bathroom walls for grab bars; installing light switches, outlets and thermostats in accessible locations; and designing kitchens and bathrooms so wheelchairs can better maneuver. *Id.* § 3604(f)(3)(C)(i)-(iii); App. 2a.

The lower court's emphasis on the § 3604(f)(1) "catch-all," over the more precise (f)(3), was wrong. Specific statutory provisions must govern over general ones. See, *e.g.*, *Edmond v. United States*, 520 U.S. 651, 657 (1997); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (internal quotes omitted). Accordingly, the court of appeals should have decided that the FHA's statute of limitations starts upon completion of construction, not the date the last housing unit in a development is sold.

The decision below will yield untenable results. 42 U.S.C. § 3604(f)(1) makes it unlawful "[t]o discriminate in ... sale or rental ...." App. 1a. Accordingly, under the lower court's view, the two-year period would run anew any time that covered housing is sold or rented. Consider the following transactional chain: A multifamily builder (1) sells to a first buyer who, after two years, (2) flips to another buyer who, after three years, (3) rents to a tenant who remains in possession for four years, and then (4) subleases to a subtenant. Nine years have elapsed since the first sale. If the lower court is correct that sale or rental triggers design and construction claims, then two years after the subtenant took occupancy he could still reach back to sue the initial developer. Eleven years would have elapsed since the initial sale.

Congress could not have intended such an absurd result, and it would greatly undermine the very purpose of having a statute of limitations at all. "Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). See also *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944) ("Statutes of limitation ... promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared").

B. There is Disagreement in the Lower Courts on the Triggering Event in Design and Construction Cases.

Not surprisingly, lower courts disagree on the precise "discriminatory housing practice" that triggers the two-year limitations period in design and construction cases. At least one case followed the courts of appeals' approach, holding that the statute runs after the last unit's sale. See *Balt. Neighborhoods, Inc. v. Rommel Builders, Inc.*, 40 F. Supp. 2d 700, 710 (D. Md. 1999). Other cases hold that the limitations period starts when the last FHA non-compliant feature in a dwelling is corrected. See *Mont. Fair Hous. v. Am. Capitol Dev., Inc.*, 81 F. Supp. 2d 1057, 1063 (D. Mont. 1999); *E. Paralyzed Veterans Ass'n, Inc. v. Lazarus-Burman Assocs.*, 133 F. Supp. 2d 203, 212-213 (E.D.N.Y. 2001).

Other courts reject the court of appeals' approach, concluding that the two-year period starts upon completion of the construction process. See, *e.g.*, *Moseke v. Miller & Smith, Inc.* 202 F. Supp. 2d 492, 506 (E.D. Va. 2002) (emphasizing "acts" of construction rather than ongoing "effects" of inaccessible features); *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d. 1129, 1142, 1144 (D. Idaho 2003) (citing *Moseke*, and agreeing that the continued existence of an alleged non-compliant building is "more akin to a continuing effect rather than a continuing violation"; limitations period starts after "the latest date that could be considered the date the design or construction process was completed ... [which is] the date the last certificate of occupancy was issued").

C. The Court of Appeals' Decision Contradicts This Court's Understanding of the Term Discriminatory "Practice."

Assuming the court of appeals correctly decided that sale or rental triggers the statute of limitations, it wrongly decided that *all* units in a development are subject to FHA claims because a single dwelling is sold within the limitations period.

An FHA claim must be brought within two years "after the occurrence or the termination of an alleged discriminatory housing *practice* ...." 42 U.S.C. § 3613(a)(1)(A). The last three dwellings at Greenhurst were sold in 1997, within two years of Respondents' 1999 filing of the amended complaint. The court of appeals thus decided that *all* Greenhurst units were subject to the FHA—not just the last three dwellings—because "*the continuing violation doctrine* applies to toll the statute of limitations until the sale of the last unit in that development." App. 33a (emphasis supplied).

The lower court's interpretation undermines this Court's understanding of discriminatory "practice" as used in other civil rights statutes. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-115 (2002), held that discrete acts of discrimination occurring *outside* a statute of limitations are not actionable as "practice" just because some acts occurred *within* the limitations period.

Morgan addressed the limitations provision for employment discrimination under Title VII of the Civil Rights Act. (The FHA is Title VIII.) That

provision requires an employee to file a charge within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).[11] Morgan, an African-American, alleged that Amtrak "'harassed and disciplined [him] more harshly than other employees on account of his race.'" *Morgan*, 536 U.S. at 105. Some of these discriminatory acts took place within the applicable statute of limitations, yet many were beyond it. *Id.* at 106. Morgan prevailed at the Ninth Circuit, which held that a plaintiff can establish a continuing violation for claims older than 180 days by showing "'a series of related acts one or more of which are within the limitations period.'" *Id.* at 107.

This Court reversed. It explained that the statute gives "no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of timely filing." *Id.* at 111. Furthermore, the Court has "repeatedly interpreted the term 'practice' to apply to a discrete act or single 'occurrence,' even when it has a connection to other acts." *Ibid.* The Court recently reaffirmed its reasoning in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162, 2169 (2007): "A new violation does not occur, and a new [limitations] period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail

[11] The FHA's provision is parallel: a claim for housing discrimination must be brought within two years "after the occurrence or the termination of an alleged discriminatory housing practice ...." 42 U.S.C. § 3613(a)(1)(A); App. 1a.

adverse effects resulting from the past discrimination."

In short, each act that comprises a discriminatory "practice" starts a new clock. Separate acts may not be lumped together to form a single unlawful practice to fabricate a timely filing. In the case at bench, the court of appeals made the same mistake as the Ninth Circuit in *Morgan,* and it should be similarly reversed. Assuming for design and construction purposes that the triggering event is sale or rental, *each* sale or rental is discrete and independent for limitations purposes. The court of appeals erroneously concluded that the last unit sale at Greenhurst, occurring within the limitations period, allowed Respondents to then sue for *all prior* unit sales, no matter how long ago they occurred.

The court of appeals was wrong as to the triggering act for the FHA's statute of limitations. It was also wrong to lose sight of the discrete acts that constitute a timely discriminatory "practice." This Court should correct these errors.

CONCLUSION

The opinion of the court of appeals is a boon for *all* plaintiffs. It gives them Article III standing in *every* case. Furthermore, FHA plaintiffs are now free to litigate statutory violations that *always* renew. To restore the important principles restricting federal court review established by Article III and statutes of limitations, this Court should examine the court of appeals' decision.

For all of the foregoing reasons, the petition should be granted.

September 26, 2007

Respectfully submitted,

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Supreme Court, U.S.
FILED
07-421 SEP 26 2007
OFFICE OF THE CLERK

No. 06-____

IN THE
SUPREME COURT OF THE UNITED STATES

VILLAGE OF OLDE ST. ANDREWS, INC.;
WKB ASSOCIATES, INC.,

Petitioners,

v.

FAIR HOUSING COUNCIL, INC.;
CENTER FOR ACCESSIBLE LIVING, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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September 26, 2007

TABLE OF APPENDICES

Page(s)

A. Constitutional and Statutory Provisions 1a

B. July 31, 2007 Letter from the U.S. Supreme Court, extending time to file Petition for Writ of Certiorari 3a

C. May 19, 2007 Order of U.S. Court of Appeals for the Sixth Circuit, denying motion to publish its December 15, 2006 Decision 4a

D. May 14, 2007 Order of the U.S. Court of Appeals for the Sixth Circuit Denying for Petition Rehearing Enbanc 5a

E. December 15, 2006 Opinion of the U.S. Court of Appeals for the Sixth Circuit 7a

F. March 14, 2003 Memorandum Opinion and Order of the U.S. District Court for the Western District of Kentucky 38a

G. November 26, 2003 Affidavit of John Clark 64a

H. January 30, 2002 Plaintiff's Response to Defendants' First Interrogatories and Requests to Produce to Plaintiffs 67a

I. Excerpted Portions of the Deposition of Anthony Baize 101a

J. February 12, 1999 First Amended Complaint 154a

TABLE OF APPENDICES (continued)

Page(s)

K. Illustration of the Dwellings and Aerial Photograph of the Greenhurst Development 172a

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

- ***U.S. Const., Art. III, § 2:*** "The judicial Power shall extend to all Cases ... [and] Controversies ...."
- ***42 U.S.C. § 3613(a)(1)(A):*** "An aggrieved person may commence a civil action ... not later than two years after the occurrence or the termination of an alleged discriminatory housing practice ... to obtain appropriate relief with respect to such discriminatory housing practice ...."
- ***42 U.S.C. § 3604(f):*** "...[I]t shall be unlawful—

  "(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—

  (A) that buyer or renter; [or]

  (B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; ....

  "(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling ... because of a handicap of—

  (A) that person; or

  (B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; ...

  "(3) For purposes of this subsection, discrimination includes—....

  (C) in connection with the design and construction of covered multifamily dwellings for

first occupancy after the date of enactment of the Fair Housing Act Amendments of 1988, a failure to design and construct those dwellings in such a manner that—

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs;

(iii) all premises within such dwellings contain the following features or adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow the installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space."

APPENDIX B

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

July 31, 2007

Mr. Stuart E. Alexander
401 West Main Street
1400 One Riverfront Plaza
Louisville, KY 40202

Re: Village of Olde St. Andrews, Incorporated, et al. v. Fair Housing Council, Incorporated, et al.
Application No. 07A82

Dear Mr. Alexander:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on July 31, 2007 extended the time to and including September 26, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by

Erik A. Fossum
Case Analyst

APPENDIX C

Case No. 05-5862

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

FAIR HOUSING COUNCIL, INC., a Kentucky non-profit corporation; CENTER FOR ACCESSIBLE LIVING, INC., a Kentucky non-profit corporation

Plaintiffs-Appellees,

FILED
May 19, 2007
LEONARD GREEN, Clerk

v.

VILLAGE OF OLDE ST. ANDREWS, INC.;
Defendant

WKB ASSOCIATES, INC.

Defendant - Appellant

BEFORE: RYAN, COOK, Circuit Judges; and GWIN, District Judge,*

Upon consideration of the appellant's motion to publish this court's decision of 12/15/06,

It is ORDERED that the motion be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

\s\ Leonard Green
Leonard Green, Clerk

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX D

No. 05-5862

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FAIR HOUSING COUNCIL, INC., ET AL., Plaintiffs-Appellees, v. VILLAGE OF OLDE ST. ANDREWS, INC., ET AL., Defendants-Appellants.	)	**FILED** May 14, 2007 LEONARD GREEN, Clerk ORDER

BEFORE: RYAN and COOK, Circuit Judges; and GWIN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Hon. James Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

ENTERED BY ORDER OF THE COURT

\s\ Leonard Green
Leonard Green, Clerk

APPENDIX E

File Name: 06a0900n.06
Filed: December 15, 2006

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 05-5862
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FAIR HOUSING COUNCIL, Inc., et al., Plaintiffs-Appellees,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY (No. 3:98-CV-00630)
v.	)	
VILLAGE OF OLDE ST. ANDREWS, Inc., et al., Defendants-Appellants.	)	

BEFORE: RYAN, COOK, Circuit Judges; and GWIN, District Judge, Gwin.* (District Judge,)

Plaintiffs Fair Housing Council and Center for Accessible Living allege that the Defendants, the Village of Olde St. Andrews, Inc., WKB Associates, Inc., and Kenneth R. Brown, engaged in disability discrimination in their design and construction of

*The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

multifamily residential developments. In support of this allegation, the Plaintiffs say the Defendants designed and constructed residences that were not accessible to handicapped persons as required by the Fair Housing Amendments Act of 1988 ("Fair Housing Act").

After trial, the district court concluded that Defendants engaged in unlawful discrimination and ordered the Defendants to perform remedial construction on the developments. Defendant WKB appeals, arguing that (1) the Plaintiffs lack standing to sue, (2) even if the Plaintiffs had standing, the applicable statute of limitations bars their claim, and (3) that the district court committed error in failing to allow the Defendant to demonstrate compliance by other means than those set forth by the HUD guidelines. 44 Fed. Reg. at 9472-9515. For the reasons that follow, we **AFFIRM** in part and **REVERSE** in part the decision of the district court.

I. Background

The Plaintiff Fair Housing Council operates as a nonprofit corporation to promote equal housing availability for, among others, disabled individuals. The Center for Accessible Living is a nonprofit corporation that advocates independent living for disabled people.

The Defendant-Appellant WKB is a Kentucky corporation that builds real estate developments, principally in Louisville, Kentucky. Between 1993 and 2001, WKB constructed the three multifamily housing developments at issue in this case. Those developments include the Village of Olde St. Andrews, the Village of Deer Creek, and Greenhurst Condominiums.

No. 05-5862
Fair Housing Council, et al. v. Village of Olde St. Andrews, et al.

After its construction, the Fair Housing Council observed steps leading to the residences at the Defendant Village of Olde St. Andrews that it believed violated the Fair Housing Act. Thereafter, the Fair Housing Council employed disabled individuals to enter and inspect the property for Fair Housing Act violations. The Center for Accessible Living provided these "testers" and the Fair Housing Council trained, paid, and debriefed them. After identifying a number of potential violations, the Fair Housing Council and the Center for Accessible Living sued Olde St. Andrews; WKB, and the development's architect, Kenneth Brown. Plaintiffs later added claims against the Greenhurst Condominiums and the Village of Deer Creek, two other complexes designed by Brown and owned by WKB. Before trial, Brown settled the claims made against him.

In motions for summary judgment, the Defendants argued that Plaintiffs lacked standing to sue and that the statute of limitations stopped the claims as against Greenhurst. Additionally, the Defendants argued that they should have had the opportunity to demonstrate compliance with the Fair Housing Act by means other than those provided by the HUD guidelines. The district court denied summary judgment, finding that Sixth Circuit precedent gave standing. After a bench trial resulted in a decision for Plaintiffs, WKB appealed.

With its appeal, the Defendant argues that the district court erred in holding that Plaintiffs had standing to sue, that the statute of limitations barred Plaintiffs' claims in part, and that the district court

overly deferred to HUD's building guidelines. We now consider these arguments.

II. Standard of Review

We review a district court's denial of summary judgment de novo. *Frazier v. Honda of Am. Mfg., Inc.*, 431 F.3d 563, 565 (6th Cir. 2005). Summary judgment is only appropriate when the evidence submitted shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)). In seeking summary judgment, the moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the nonmoving party's case. *Waters v. City of Morristown*, 242 F.3d 353, 358 (6th Cir. 2001). A fact is material if its resolution will affect the outcome of the lawsuit. *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 597 (6th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In deciding whether the moving party has met this burden, a court must view the facts and all inferences drawn from them in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

III. Discussion

With this appeal, Defendant-Appellant WKB argues that the district court erred in finding that the Plaintiffs have standing and erred when it found that the statute of limitations does not bar the Plaintiffs'

claims. Additionally, the Defendants argue that the district court afforded inappropriate deference to the HUD guidelines when determining whether or not WKB's housing developments complied with the Fair Housing Act. We address each argument below.

A. Standing

Article III of the United States Constitution limits the jurisdiction of this Court. Specifically, Article III § 2 confers federal jurisdiction over "cases" and "controversies." Standing is an important element of the case or controversy requirement. To demonstrate standing under Article III, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). *See also Raines v. Byrd*, 521 U.S. 811, 818-19 (1997).

Typically, the standing inquiry does not end with the Article III requirements. Instead, even where a plaintiff can show that its case falls within these constitutional bounds, the plaintiff must also overcome prudential barriers on the exercise of federal jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). However, because prudential limitations on jurisdiction are judicially self-imposed rather than constitutionally mandated, Congress has the power to waive prudential barriers by statute. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing

rules.'") (quoting *Warth*, 422 U.S. at 501). With regard to the Fair Housing Act, Congress has made a decision to afford standing to all litigants within the Constitutional limits. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n. 9 (1979). As a result, the plaintiffs in the instant case need only satisfy Article III requirements in order to demonstrate standing.

1. Circuit Court's Power to Review Standing Issue

As an initial matter, the Plaintiffs argue that denial of summary judgment is not appealable where, as in the instant case, "summary judgment is denied and the movant subsequently loses after a full trial on the merits . . . " *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990) (citing *Locricchio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564 (Fed. Cir. 1986)). In *Jarrett*, 896 F.2d at 1016 n. 1, we found that despite the harm that may flow from allowing a wrongful denial of summary judgment to go unreviewed, "it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgement motion demonstrated the need for a trial."

Recognizing that this policy rational does not always apply, we have subsequently carved out exceptions to the general rule. For example, in *McPherson v. Kelsey*, we held that a movant can appeal

the denial of summary judgment even after losing a trial on the merits where the issue on appeal is purely one of law, such as governmental immunity. 125 F.3d 989, 995 (6th Cir. 1997). Other circuits have recognized similar exceptions. *See Banuelos v. Const. Laborers' Trust Funds,* 382 F.3d 897, 902 (9th Cir. 2004) ("This general rule, however, does not apply to those denials of summary judgment motions where the district court made an error of law that, if not made. would have required the district court to grant the motion."); *Home Savings of America v. United States,* 399 F.3d 1341 (Fed. Cir. 2005) (reviewing a district court's denial of the government's motion for summary judgment for lack of standing even after a final judgment on the merits was entered for the plaintiffs).

We find, however, that there is no need for us to now determine whether or not we may appropriately review the district court's denial of Defendant WKB's motion for summary judgment with regard to the issue of standing. This court may always address the issue of standing, irregardless of the lower court's treatment of that issue. *See Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'") (quoting *Mitchell v. Maurer,* 293 U.S. 237, 244 (1934)).

2. Whether the District Court Erred in Determining the Plaintiffs had Standing

Defendant WKB argues that the Plaintiffs lack standing to sue because the Plaintiffs fail to demonstrate any injury independent of the instant

litigation that is fairly traceable to the allegedly discriminatory actions of the Defendants. Responding, the Plaintiffs claim that their investigation into disability discrimination at the WKB properties caused them to divert substantial institutional resources from other projects or standard activities.

Addressing these arguments on summary judgment, the district court found that the Plaintiffs failed to present sufficient evidence to support their claim that they were forced to divert funds for the WKB investigation to the detriment of other projects. However, applying this Circuit's decision in *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993)[1], the district court reluctantly found that the Plaintiffs' prelitigation investigation expenses related to the three testers that the Fair Housing Council sent to the WKB properties were sufficient to confer standing. Defendant WKB now argues that we should overturn *Hooker*. In the alternative, WKB claims that *Hooker* is fairly

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[1] Therefore, FHCS "can establish standing by alleging a concrete and demonstrable injury, including an injury arising from a 'purportedly illegal action [that] increases the resources the group must devote to programs independent of its suit challenging the action.' " Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 646 (6th Cir.1991) (quoting Spann v. Colonial Village, Inc., 899 F.2d 24, 27 (D.C.Cir.), cert. denied,498 U.S. 980, 111 S.Ct. 508, 112 L.Ed.2d 521 (1990)). According to the complaint, "Fair Housing Contact Service conducted an investigation, and confirmed the facts and circumstances alleged [in the complaint]." FHCS devoted resources to investigating the defendants' practices and alleges that it has confirmed that defendants do discriminate on the basis of familial status. Therefore, FHCS has standing."

Hooker v. Weathers, 990 F.2d 913 at 915 (6th Cir. 1993).

distinguishable from the instant case and that even under the *Hooker*, the Plaintiffs lack standing.

a. Organizational Standing Under the Fair Housing Act

The United States Supreme Court dealt with the issue of organizational standing under the Fair Housing Act in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In that case, a fair housing organization brought suit against a realty corporation, alleging "racial steering" in violation of the Fair Housing Act of 1968, 42 U.S.C. § 3604. In its complaint, the fair housing organization, HOME, alleged that it had "been frustrated by defendant's racial steering practices in its efforts to assist equal access to housing through counseling and other referral services . . . [and] had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." *Id.* at 378. Arguing that HOME lacked standing, the defendant moved to dismiss. The district court granted the motion, finding that HOME failed to allege a direct injury sufficient to confer standing. The Supreme Court reversed and held that the dismissal was wrong, stating:

> [i]f, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities -- with the consequent

> drain on the organization's resources--constitutes far more than simply a setback to the organization's abstract social interests . . ..

Id. at 379.

Interpreting *Havens*, the circuit courts have reached varying conclusions about the showing that an organization must make to demonstrate standing under the Fair Housing Act. Before highlighting the different approaches, we first note that the circuits generally agree that an organization meets Article III standing requirements where it can show that the defendant's alleged violations of the Fair Housing Act caused it to divert resources from other projects or devote additional resources to a particular project in order to combat the alleged discrimination. *See Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 78 (3rd Cir. 1998) ("In deciding organizational standing questions after *Havens*, appellate courts have generally agreed that where an organization alleges or is able to show – depending on the stage of the proceeding – that it has devoted additional resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement.").

The circuit courts differ, however, on the extent to which they will consider injury related to litigation in reviewing standing. Several courts have taken a more restrictive approach, holding that to show standing, an organization must demonstrate that it suffered a concrete injury that is completely independent from the

economic and non-economic costs of the litigation.[2] *See Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) ("An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation."); *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 79 (3rd Cir. 1998) ("We align ourselves with those courts holding that litigation expenses alone do not constitute damage sufficient to support standing."); *Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization."); *Walker v. City of Lakewood*, 272 F.3d 1114, 1124 n.3 (9th Cir. 2001) (declining to consider "the time and money the [housing organization] has expended in prosecuting this suit" in deciding if the organization had standing). While

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[2] In these cases, the courts have found standing where the defendant's discriminatory actions forced the plaintiff organization to expend resources apart from those dedicated to the litigation, such as where an organization poured additional funds and manpower into a broad education initiative to combat the discrimination. *See Spann*, 899 F.2d at 27-28 (organization demonstrated that the defendant's racially discriminatory advertising forced it to expend additional resources to educate the community about housing discrimination and counsel individuals facing such discrimination).

following the restrictive approach, the Third Circuit has considered litigation expenses when concluding that an organization had standing where the organization "stopped everything else" in order to devote attention to the lawsuit. *Alexander v. Riga,* 208 F.3d 419, 427 n. 4 (3rd Cir. 2000).

Other circuits take a more lenient approach, allowing organizations to prove standing by showing that they diverted resources toward litigation to counteract the defendant's housing discrimination. For example, in *Village of Bellwood v. Dwivedi,* 895 F.2d 1521, 1526 (7th Cir. 1990), the Seventh Circuit held "that only injury which needs be shown to confer standing on a fair housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination." There, the Court reasoned that the mere fact that the organization lost the opportunity to provide additional or increased counseling because it had directed its resources toward the lawsuit constituted a cognizable injury. *Id. See also Ragin v. Harry Macklowe Real Estate Co.,* 6 F.3d 898 (2nd Cir. 1993) (finding that the plaintiff housing organization had standing based primarily on the significant resources the organization had to devote to investigating the defendant's alleged discriminatory actions and challenging these actions through litigation); *Arkansas ACORN Fair Housing, Inc. v. Greystone Development, Ltd. Co.,* 160 F.3d 433, 434-35 (8th Cir. 1998) ("While the deflection of an organization's monetary and human resources from counseling or educational programs to legal efforts

aimed at combating discrimination, such as monitoring and investigation, is itself sufficient to constitute an actual injury, the injury must also be traceable to some act of the defendant.") (internal citations omitted).

The Sixth Circuit falls into the latter group, taking a similarly lenient approach. Though we require a plaintiff to show some injury that is independent of the costs of litigation, we have interpreted that standard narrowly, finding that costs related to prelitigation investigation can form the basis for standing. *See Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 646 (6th Cir. 1991); *Hooker*, 990 F.2d at 915.

In *Housing Opportunities*, 943 F.2d at 646, a housing organization sued a local newspaper, alleging that the paper published discriminatory housing advertisements in violation of the Fair Housing Act. Briefly discussing the issue of standing, the *Housing Opportunities* Court cited the standard set forth in *Spann*, generally requiring the plaintiff to demonstrate "injury, *including* an injury arising from a 'purportedly illegal action [that] increases the resources the group must devote to programs independent of its suit challenging the action.'" *Id.* (quoting *Spann*, 899 F.2d at 27) (emphasis added). In *Housing Opportunities*, the plaintiff's devotion of resources to investigate and combat the defendant's discriminatory advertising was found sufficient to confer standing. *Id.* Although not explicitly stated, *Housing Opportunities* suggests that this Court does not preclude consideration of the costs of litigation when determining standing, but additionally

requires the plaintiff to prove some type of injury beyond these costs.

We next revisited the issue of organizational standing under the Fair Housing Act in *Hooker*, 990 F.2d at 915. In that case, an individual, Richard Hooker, contacted a local fair housing organization to complain of age discrimination at a local trailer park, alleging that the manager of the trailer park refused to rent or sell trailers to young people or families with children. To investigate the claim, the housing organization sent a tester to the trailer park to inquire about renting a trailer. The manager refused to rent to the tester, telling her that she was too young. Based on this investigation, the housing organization filed suit against the manager of the trailer park. The district court dismissed the suit for lack of standing. On appeal, the *Hooker* Court reversed the dismissal. Holding that the act of sending a tester to investigate Hooker's claim of discrimination was sufficient to confer standing, the court stated, "FHCS devoted resources to investigating the defendants' practices and alleges that it has confirmed that defendants do discriminate on the basis of familial status. Therefore, FHCS has standing." *Id.*

Recently, in an unpublished decision, *Hughes v. Peshina*, No. 02-3660, 2004 WL 187550 (6th Cir. 2004), we followed the *Hooker* Court's holding. Just as in *Hooker*, the plaintiff housing organization in Hughes followed up on a complaint of discrimination on the basis of familial status by sending a tester to attempt to rent property from the defendants. When the tester faced similar discrimination, the organization filed suit. Finding that the housing organization had "devoted its

efforts to investigating whether [the defendants] had violated the law, thus diverting its resources away from the other housing services it provides and frustrating its mission of insuring fair housing practices," the Hughes Court found the housing organization had suffered an injury in fact sufficient to confer standing. *Id.*

b. Reconsidering Hooker

Seeking reversal of the district court's conclusion that Plaintiffs Fair Housing Council and the Center for Accessible Living have standing, Defendant WKB first argues that we should overturn *Hooker*, 990 F.2d at 915. However, this Court must adhere to the well-settled rule that "[r]eported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court." 6th Cir. R. 206(c)). *See also Valentine v. Francis*, 270 F.3d 1032, 1035 (6th Cir. 2001); *Salmi v. Secretary of Health and Human Services*, 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision."). *Hooker* therefore remains controlling authority for this panel.

c. Do the Plaintiffs Lack Standing Even Under the Hooker Standard?

Under our Article III standing inquiry, a Plaintiff:

> (1) must have suffered some actual or threatened injury due the to [sic] alleged illegal conduct (the "injury in fact element"); (2) the injury must be fairly traceable to the challenged action (the "causation element"); and (3) there must be a substantial likelihood that the relief requested will redress or prevent [plaintiff]'s injury (the "redressability element").

Stevenson v. J.C. Bradford & Co. (In re Cannon), 277 F.3d 838, 852 (6th Cir. 2002). The standing dispute here centers on whether Plaintiffs suffered a cognizable injury in fact. The district court concluded that the Plaintiffs suffered a sufficiently traceable injury because they incurred monetary pre-litigation expenses or lost opportunity costs associated with the investigation. Specifically, the court determined that, under the Sixth Circuit precedent of *Hooker v. Weathers,* 990 F.2d 913, 915 (6th Cir. 1993), such prelitigation costs and expenses conferred Article III standing on the Plaintiffs.

Because we conclude that the Fair Housing Council set forth sufficient evidence to demonstrate that it suffered an injury that is both independent of the instant litigation and fairly traceable to the discriminatory actions of the Defendants, we find that Plaintiff Fair Housing Council had standing to bring this action. In contrast, because the Plaintiff Center for Accessible Living presents no evidence that they did anything more than identify individuals that might serve as potential testers, the Court finds that the Center for Accessible Living has not established proof that it suffered an injury in fact. Accordingly, we find

that the Center for Accessible Living does not enjoy standing to make claims in this action.

1. Fair Housing Council

As discussed above, the *Hooker* Court made clear that an organization suffers a concrete injury sufficient to confer standing when it devotes resources to training and deploying testers to investigate suspected instances of discrimination. The Fair Housing Council suffered precisely this type of injury in the instant case.

Seeking to distinguish *Hooker*, Defendant WKB argues that the Fair Housing Council received a fixed grant from HUD for the purpose of investigating housing discrimination through the use of testers. Defendant WKB argues this receipt of HUD financing for testing differentiates this case.[3] In fact, WKB claims that the HUD funding required the Plaintiff to perform such tests or it would forfeit future funding. However, the mere fact that the Fair Housing Council had already allocated funds for the use of testers, does not mean that the use of a portion of those funds to investigate WKB properties does not amount to a concrete injury.

While this Court has recognized that the diversion of funds from certain activities such as counseling or education can be a sufficient injury to confer standing, it has not required a Plaintiff to demonstrate a redistribution of funds in all cases. For

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[3] The Fair Housing Council's budget narrative work plan covering the time span at issue allocates $7,650 to pay for approximately 255 test visits. (J.A. 289.) The budget does not specify whether of not it can be later amended to reallocate funds.

example, the *Hooker* Court found that the mere fact that the plaintiff had devoted resources to investigating the alleged discrimination was sufficient – it did not indicate what the plaintiff would have otherwise done with those resources, nor suggest that the plaintiff would need prove that they cut other services due to the plaintiff's investigation. Moreover, almost anytime an organization such as the Fair Housing Council funds a particular project, such as the WKB investigation, the pool of resources that it has to combat other instances of discrimination grows smaller. The opportunity cost, the value of the opportunity forgone by using funds on the Olde St. Andrews testing, is real. In our world of scarce resources, every expenditure of money, time or other resources results in the loss of the benefit that would have resulted if the same time or money had been spent on something else. If the Fair Housing Council had not expended time and money on testing at Olde St. Andrews, it could have used those monies for other testing.

Indeed, the Plaintiffs argue that as a result of the Fair Housing Council's investigation of the WKB properties, FHC used a significant portion of resources that would otherwise be available for fighting disability discrimination. While not explicit, we find evidence of this shift in the Fair Housing Council's records during the time in question. For example, the final statement of work that the Fair Housing Council submitted with its 2000 grant proposal shows a clear focus on disability rights and the training and deployment of testers to investigate dwelling structures for accessibility problems. (J.A. 353.) For a housing organization that

traditionally monitored and investigated a broad range of discriminatory actions, this new focus on disability discrimination very likely means that the organization turned its attention away from other incidents of discrimination.

Defendant WKB next argues that the instant case is distinguishable from *Hooker* because the *Hooker* plaintiff investigated the defendant trailer park only after receiving a complaint of discrimination, whereas the Fair Housing Council received no complaints of discrimination prior to investigating the Village of Olde St. Andrews. Essentially, WKB suggests that any injury that may stem from the Fair Housing Council's investigation of WKB properties is not fairly traceable to the acts of the Defendants because the Fair Housing Council initiated the investigation.

In the instant case, the Fair Housing Council was tipped off to potentially discriminatory conditions at the Village of Olde St. Andrews after noticing that all of the units in the development had steps leading to the front door, creating an "inaccessible route" for disabled individuals. (Dist. Ct. Op. 15-16, J.A. 89-90.) Part of the Fair Housing Council's mission includes investigating and monitoring housing developments for suspected incidences of discrimination. Regardless of whether an organization learns of potential discrimination through independent complaints or through its own observations, any action it takes in combating that discrimination is fairly traceable to the defendant's discriminatory acts. *See e.g., Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir. 1994) (finding that a housing organization had standing when the organization,

acting on its own initiative rather than in response to a specific complaint, sent testers to investigate racial steering at certain New York City rental properties).

We accordingly find that the resources that the Fair Housing Council directed toward training and employing testers to investigate the Village of Olde St. Andrews constitutes a concrete injury.[4] Moreover, this injury is directly traceable to the Defendants' construction of the housing development in a manner resulting in discrimination toward disabled individuals. We therefore affirm the District Court's finding that Plaintiff Fair Housing Council has standing under the Fair Housing Act.

2. Center for Accessible Living

As we previously noted, Center for Accessible Living's asserted grounds for standing are far less established than the Fair Housing Council's. The Plaintiffs claim that the Center for Accessible Living

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[4] The Plaintiffs additionally argue that even were we to find that the direct testing costs do not constitute a traceable injury, they suffered other concrete injuries sufficient to confer standing. The Plaintiffs specifically point to several tasks that the Fair Housing Council claims its staff performed in lieu of other normal agency operations, such as training and recruiting the testers and designing the testing portion of the investigation, observing the Village of Olde St. Andrews development, meeting with the Center for Accessible Living. As proof of these prelitigation activities, the Plaintiffs point to a record entitled "Plaintiffs' Diversion of Resources," which the Plaintiffs attached to their motion for Attorney Fees. This document shows that Plaintiff the Fair Housing Council's staff dedicated approximately 32 hours to the prelitigation investigation of the Village of Olde St. Andrews. (J.A. 473-74.)

provided the testers for the Fair Housing Council, but they offer no proof that the Center for Accessible Living did anything more than identify individuals that might serve as potential testers. Indeed, the totality of Center for Accessible Living's claimed injury - independent of the litigation - appears limited to its time spent rounding up three testers. In light of the fact that the Center for Accessible Living has failed to present evidence of its cost or time spent recruiting testers, we cannot conclude that the Center for Accessible Living has suffered a "concrete and particularized" injury. *Sandusky Country Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004). Therefore, the Court finds that Article III prohibits the Center for Accessible Living from challenging Defendants' conduct.

B. Statute of Limitations

The statute of limitations question presented in this case, which appears to be one of first impression, is what "act" should constitute the triggering event for claims brought under the discriminatory housing provisions of the Fair Housing Act. The Defendant WKB says that the statute of limitations bars the Plaintiffs' case because the design and construction of the relevant housing units, which occurred more than two years before Plaintiffs commenced this action, tolls the statutory period. The Plaintiffs say their claims are not barred because the non-compliant structures constitute a continuing violation, such that the statute of limitations does not begin to run until the violation terminates.

Plaintiffs filed suit on October 6, 1998, alleging that the Defendants did not build the Village of Olde St.

Andrews in compliance with the Fair Housing Act. On February 12, 1999, the Plaintiffs filed an amended complaint in which they also alleged Fair Housing Act violations at the Greenhurst and Deer Creek developments. The Defendants concede that the Plaintiffs' claims with regard to the Deer Creek and Village of Olde St. Andrews developments fall within the two-year statute of limitations regardless of what we ultimately determine to constitute the triggering event. The Defendants did not even complete construction on the Olde St. Andrews or Deer Creek Developments until 1999 and 2001 respectively, well after the Plaintiffs filed suit. However, the Defendants completed construction on the Greenhurst development in 1995 and had sold all but three of the units prior to February 12, 1997, two years before the Plaintiffs filed their amended complaint.

The Defendants argue that the statute of limitations should run from either the date of completion of construction or the date that each individual unit was sold, thereby barring all claims involving the Greenhurst development except with regard to the last three units that were sold after February 12, 1997. In response, the Plaintiff argues that this Court should consider buildings that do not comply with Fair Housing Act standards to be continuing violations. Under that theory, the continuing violation doctrine would toll the statute of limitations until the Defendants remedy the conditions making the developments inaccessible to disabled individuals.

In addressing this issue, the district court agreed with the Plaintiffs that the continuing violation doctrine does apply "so long as there is some ongoing *act* being performed as it pertains to the design and construction of the development." The district court found both the Defendants' and the Plaintiffs' arguments flawed, however, with respect to what act or event should trigger the statute of limitations. As such, the district court concluded that the sale or rental of the last nonconforming unit in a development is the act or event that triggers the statute of limitations. Applying this standard, the district court held that the Plaintiffs' claims were not time barred because the last discriminatory act in this case occurred less than two years before the Plaintiffs filed this action. We agree with the district court, but explicitly limit our holding to the facts of this case.

Under the Fair Housing Act, the statute of limitations requires a plaintiff to file a complaint within two years after the "occurrence or termination of an alleged discriminatory housing practice . . . whichever occurs last." 42 U.S.C. § 3613(a)(1)(A). Here, the particular provision of the Fair Housing Act allegedly violated makes it unlawful to "discriminate in the sale or rental, or otherwise make unavailable or deny a dwelling to any buyer or renter." 42 U.S.C. § 3604(f)(1-2). Additionally, in actions brought under the Fair Housing Act, the Supreme Court has recognized that a complaint alleging a continuing illegal practice, rather than an isolated incident of violative conduct, is timely when filed within two years of the last occurrence of the illegal practice. *Havens*, 455 U.S. at 380-81.

No. 05-5862
Fair Housing Council, et al. v. Village of Olde St. Andrews, et al.

In appealing the judgment of the district court, Defendant WKB says that the applicable two-year statue of limitations should begin to run upon completion of the design and construction of the housing units. In support of this proposition, the Defendant argues that the design and construction of the housing units constitutes the gravamen of the Fair Housing Act violation alleged by the Plaintiffs and therefore should start the statute of limitations. The Court rejects this argument.

First, as a preliminary matter the Court finds instructive - though certainly not dispositive - that an overwhelming majority of the federal courts that have addressed this issue have rejected the position advanced by the Defendant and adopted a less restrictive interpretation of the Fair Housing Act's tolling provisions. *See, e.g., Eastern Paralyzed Veterans Ass'n, Inc. v. Lazarus-Burman Assoc.*, 133 F.Supp.2d 203 (E.D.N.Y. 2001) ("LIHS does not complain of a discrete violation of the FHA, but instead describes an unlawful practice that . . . has continued to the present day. As such, LIHS alleges a continuing violation which, therefore, is timely made."); *Montana Fair Housing, Inc. v. American Capital Development, Inc.*, 81 F.Supp.2d 1057 (D. Mont. 1999); *Baltimore Neighborhoods, Inc. v. Rommel Builders*, 40 F.Supp.2d 700 (D. Md. 1999). Additionally, from a purely textual standpoint a violation of the relevant Fair Housing Act provision here requires more than the mere design and construction of a noncompliant housing unit. Recall, the text of the Fair Housing Act itself focuses on housing discrimination *in the sale or rental* of housing units. Accordingly, it is

difficult to credit the Defendant 's assertion that the design and construction of the units in question constitute the core of any Fair Housing Act violation.

Moreover, it makes little practical sense to start the limitations period running from the date of completion of the design or construction. Often, housing units go unsold or unlet for some time after they are built. If the statute of limitations were to begin running immediately upon completion of the building, potential buyers may not even look at the property until after the statute of limitations has run. Such a result would run counter to the well established principle that in interpreting the Fair Housing Act, courts are to give effect to the "broad remedial intent of Congress embodied in the Act." *Havens Realty Corp.*, 455 U.S. at 380-81; *see also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972).

We find, however, that the view that the statute of limitations is tolled until the noncompliant conditions are remedied is equally inconsistent with 42 U.S.C. § 3604(f)(1). The Fair Housing Act specifies that the two year limitations period begins to run at the termination of the alleged act of discrimination. In the context of the construction and design of multifamily dwelling units that are inaccessible to disabled individuals, the discriminatory act occurs during the sale or rental of that unit. Thus, once a unit has been sold or rented, the discriminatory act is complete.

Amici argues that the continuing violation should apply to toll the statute of limitations even after the sale of all of the units in a particular environment. They cite *Havens*, 455 U.S. at 380-81, for the proposition that "where a plaintiff, pursuant to the Fair Housing Act,

challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [two years][5] of the last asserted occurrence of that practice." They further claim that failing to remedy the noncompliant conditions constitutes a failure to otherwise make available accessible housing in violation of 42 U.S.C. § 3604(f)(1). However, the statutory language of 42 U.S.C. § 3604(f) specifically makes the design and construction of inaccessible housing units unlawful in the context of the sale or rental of the units. Therefore, the language appearing in 42 U.S.C. § 3604(f)(1) prohibiting owners of those developments from otherwise making unavailable accessible housing serves as a catch-all provision to cover other ways that an individual may make housing unavailable to the disabled beyond the forms of discrimination listed in 42 U.S.C. § 3604(f)(3)(c).

We therefore find that in cases where the plaintiff alleges that the owner of a multi-family housing development failed to design and construct the development so as to make it accessible to disabled individuals, the limitations period will depend on the specific circumstances of each case. For example, where a disabled individual seeks to buy a particular unit and discovers that the unit is inaccessible because it was not designed in conformity with the FHA, the limitations period for that individual's claim would begin to run from the date that the individual attempted to buy the unit and discovered the nonconforming conditions.

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[5] The Havens court applied the former 180-day limitations period. The current limitations period is two years.

However, in a case such as the instant case, where the plaintiff alleges that the owner or developer engaged in a policy or practice throughout the entire development of constructing housing units that fail to comply with the FHA, the continuing violations doctrine applies to toll the statute of limitations until the sale of the last unit in that development. Along those same lines, where the plaintiff can show that the owner of several housing developments engaged in a continuous policy or practice with regard to the noncompliant design and construction of each of the developments, the continuing violation doctrine may toll the running of the limitations period until the last unit of all of the implicated developments is sold.

Applying this rule to the instant case, we find that the Plaintiffs' claims fall safely within the statute of limitations. As such, the Court rejects the Defendant's argument and affirms the district court's holding that the statute of limitations does not begin to run in actions alleging this type of discriminatory practice until the last non-compliant unit is sold.[6]

C. HUD Guidelines

Finally, Defendant WKB also says that the district court committed error in failing to allow them to demonstrate compliance with the Fair Housing Act by means other than those set forth by the applicable HUD

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[6] The Court does not address the operation of the statute of limitations in Fair Housing Act cases alleging disability discrimination in the rental of newly constructed multi-family dwellings.

guidelines. Once again, the Court rejects Defendant's argument. In its brief, the Defendant correctly notes that neither the language of the Fair Housing Act itself nor applicable federal regulations provide specific design and construction standards. The Defendant incorrectly alleges, however, that the district court impermissibly treated the relevant HUD guidelines as controlling authority.

In addressing whether the housing units complied with the Fair Housing Act, the district court explicitly stated that "the Guidelines, though relevant and highly significant, are not decisive. The real question is whether the units . . . are reasonably accessible and useable for most handicapped persons." Although the district court did note that "Defendants undoubtedly face a heavy burden of demonstrating accessability" in instances where a construction feature does not comply with the HUD guidelines, the touchstone of the district courts compliance analysis was clearly the Act itself. Accordingly, we find that Defendant WKB had ample opportunity to demonstrate compliance with the Fair Housing Act by means other than those set forth by the applicable HUD guideline and simply failed to do so. Moreover, the Supreme Court has held that HUD's interpretation of the FHA is entitled to deference. *See Meyer v. Holley*, 537 U.S. 280, 287-88 (2003); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972). As such, we again reject Defendant WKB's argument and affirm the district court.

IV. Conclusion

For the foregoing reasons, this Court **AFFIRMS** in part and **REVERSES** in part the decision of the district court.

No. 05-5862
Fair Housing Council, et al. v. Village of Olde St. Andrews, et al.

RYAN, Circuit Judge, concurring. Were it not for Hooker v. Weathers, 990 F.2d 913 (6th Cir. 1993), I would hold that the Fair Housing Council, Inc., does not have Article III standing to maintain this lawsuit. It is well settled that a housing organization that has not suffered a "concrete and demonstrable injury to [its] activities," Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982), is without standing to bring suit to enforce the Fair Housing Act, 42 U.S.C. § 3604.

It strikes me as obvious that a non-profit corporation created for the purpose, inter alia, of bringing lawsuits to enforce the FHA, has not suffered a "concrete and demonstrable injury to [its] activities," (emphasis added), simply by conducting one of its activities—finding suable defendants. But Hooker has held otherwise, and it is a binding precedent I am not free to ignore and cannot distinguish in any meaningful way. Therefore, I am compelled to concur in a judgment that the Fair Housing Council, Inc., has standing, under Article III, to sue the defendant to enforce the Fair Housing Act. I agree that the Center For Accessible Living, Inc., does not have standing. I also agree that Fair Housing's lawsuit was not barred by the applicable two year statute of limitations, 42 U.S.C. § 3613(a)(1)(A).

Cook, Circuit Judge, joins in the concurring opinion only.

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:98-CV-630-H

FAIR HOUSING COUNCIL, INC., ET AL
PLAINTIFFS

v.

VILLAGE OF OLDE ST. ANDREWS, INC., ET AL.
DEFENDANTS

MEMORANDUM OPINION

Plaintiffs, the Fair Housing Council, Inc. ("FHC") and the Center for Accessible Living, Inc. ("CAL"), (collectively referred to as "Plaintiffs"), seek relief pursuant to the Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. § 3601 *et seq.* According to Plaintiffs, Defendants, the Village of Olde St. Andrews, Inc., WKB Associates, Inc., and Kenneth R. Brown, failed to design and construct three different multifamily residential developments so as to be accessible to handicapped persons as required by the FHAA.[1] The parties have filed cross motions for summary judgment. In their motion, Plaintiffs argue for

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[1] The Court is aware of and sympathetic to the fact that some disabled persons find the term "handicapped" objectionable. (Pls.' Mem. Supp. Mot. Summ. J at 2 n 2.) "Handicapped" is the term used by Congress in the applicable portions of the FHAA. *See* 42 U.S.C. § 3604(f). Accordingly, for the purpose of clarity and consistency, the Court will use the term "handicapped" in this opinion. The Court's use of this term should not be viewed in a derogatory or negative light.

judgment as a matter of law as to liability. Such a ruling would leave a trial only to determine damages.[1] Defendants argue most vigorously for dismissal due to Plaintiffs' lack of standing. Defendants also maintain that they are entitled to a judgment as a matter of law because the FHAA does not apply to their developments, and that even if the Court determines that the FHAA generally applies to the subject developments, a portion of Plaintiffs' claims is nonetheless barred by the applicable two year statute of limitations. Lastly, Defendants argue that partial summary judgment in favor of Plaintiffs is inappropriate because there are unresolved issues of material fact as to liability.

In the course of the foregoing discussion and analysis, the Court concludes that Plaintiffs have standing to maintain this action based on applicable Sixth Circuit precedent, and that the FHAA generally applies to each of the three developments. The Court also concludes that Plaintiffs' claims are not barred by the statute of limitations. As to liability, the Court finds that a trial is necessary to resolve several disputed issues of material fact.

I.

Plaintiff FHC is a nonprofit corporation whose purpose is to promote the equal availability of housing to all persons without regard to race, color, religion, gender, national origin, familial status, or disability, and to take all appropriate action in furtherance of this goal. It identifies barriers to fair housing and helps counteract and eliminate discriminatory housing practices in Kentucky and southern Indiana. It provides several education, counseling and referral services. FHC

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[1] During oral argument on the summary judgment motions, the parties agreed to allow the Court, instead of a jury, to decide all issues, including damages, should this case reach trial.

also tests housing developments to monitor the amount and scope of housing discrimination in the greater Louisville area. During the relevant time period, FHC received grants from the United States Department of Urban Housing and Development ("HUD") for enforcing the fair housing laws and to educate the community about fair housing.

Plaintiff CAL is also a Kentucky nonprofit corporation which supports individuals with disabilities in attaining independent living and in broadening their right to choose their personal degree of independence. CAL advocates expanding the range of independent living options available to such persons, educating the community about the needs of persons with disabilities, assisting persons with disabilities to seek and obtain an independent lifestyle, and advocating for the full exercise of the statutory and constitutional rights of persons with disabilities.

Defendant the Village of Olde St. Andrews, Inc. is a Kentucky nonprofit corporation. It is the homeowner's association for the Village of Olde St. Andrews development. Defendant WKB Associates, Inc. is a Kentucky corporation engaged in the business of building homes in Jefferson County, Kentucky. WKB is the builder of the three developments at issue in this action. Defendant Kenneth R. Brown is an architect. He has been licensed in Kentucky since approximately 1982. Brown served as the architect for the three developments at issue in this action.

A.

Between 1993 and 2001, WKB Associates and Brown designed and constructed three condominium developments in Jefferson County, Kentucky: (1) Greenhurst Condominiums ("Greenhurst"); (2) the Village of Olde St. Andrews ("Olde St. Andrews"); and (3) the Village of Deer Creek ("Deer Creek"). All three

developments share a similar design layout. The units or homes are arranged according to a "pin-wheel" design, with two units joined at the middle by four garages.[2] The garages are separated by smoke walls into quadrants. There are no common entrances. Each unit and garage has its own entrance. The four units and their corresponding garages share a common roof.

In 1997, the FHC began searching for violations of the FHAA at any new multifamily housing location it identified in the Jefferson County, Kentucky area. HUD provided funding specifically for this purpose. The FHC's investigation of the subject developments began with the Village of Olde St. Andrews, which came to organization's attention on July 22, 1998. The FHC selected the Village of Olde St. Andrews because of the steps in front of its homes. Prior to the investigation and lawsuit, Plaintiffs received no complaints from any purchasers or potential purchasers concerning homes built or designed by Defendants. CAL provided "testers" to the FHC to conduct the investigation of the Village of Olde St. Andrews. Testing took place between August 17, 1998, and September 1, 1998. FHC paid the three testers approximately $25 dollars per test. The testers were also generally paid $25 each for "tester" training that occurred prior to the actual on-site testing. Plaintiffs' staff debriefed the testers immediately following the tests.

The tests revealed what Plaintiffs perceived as numerous violations of the FHAA at the Village of Olde St. Andrews. As a result, Plaintiffs filed suit against Defendants on October 16, 1998, for failing to design and construct Olde St. Andrews so as to be accessible to handicapped individuals in violation of the FHAA. After

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[2] The Court uses the terms "units," "homes," and "dwellings" interchangeably in this Opinion.

filing suit, Plaintiffs retained an FHAA accessibility expert and architect, Phil Zook, to conduct on-site investigations and evaluations of Olde St. Andrews, Greenhurst, and Deer Creek. Zook conducted each investigation on July 26, 1999. Zook's investigation revealed numerous alleged violations of the FHAA at all three developments. As a result, Plaintiffs amended their original complaint to include allegations against Defendants for violating the FHAA in the design and construction of Greenhurst and Deer Creek in addition to Olde St. Andrews. Plaintiffs are seeking compensatory and punitive damages, as well as equitable relief from the Court to remedy the alleged deficiencies in the three developments.

B.

Greenhurst was completed in 1995. It consists of 156 condominium homes. Of these, 100 are single story walkout patio homes and 56 are one and half story patio homes. Zook identified several "deficiencies" in the design and construction of the Greenhurst units that Plaintiffs allege violate the FHAA including: inaccessible common use areas,[3] inaccessible building entrances caused by 6"-8" steps at the entrance thresholds of the units as well as steps at some entrance sidewalks, impermissibly narrow doorways, unusable knobbed hardware on some doors, electrical outlets and environmental controls installed at improper reach ranges, no reinforcements in bathrooms to allow for later installation of grab bars, and inaccessible location of the sinks in kitchen corners so that there is not a clear space of 30" x 48" floor area parallel to and centered on each sink. Construction at the Greenhurst

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[3] According to Zook's report, the common use areas at Greenhurst include a pool, clubhouse, sidewalks, and parking areas.

development was totally complete at the time of Zook's visit, and all the units had been sold and were occupied.

Olde St. Andrews was completed in 1999. It consists of 112 condominium homes. Of these, 94 are single story patio homes, and 18 are two story townhouse homes. Zook identified several "deficiencies" in the design and construction of the Olde St. Andrews units that Plaintiffs allege violate the FHAA including: inaccessible public and common use areas,[4] inaccessible building entrances caused by 6"-8" steps at the entrance thresholds of the units as well as steps at some entrance sidewalks, impermissibly narrow doorways, electrical outlets installed at improper reach ranges, no reinforcements in bathrooms to allow for later installation of grab bars, bathrooms that do not have sufficient maneuvering space around the toilet or shower, and kitchen plans that place the sinks in an angled section of the corner so that there is not a 30" x 48" clear floor space parallel to and centered on the sinks. At the time of Zook's inspection, the Olde St. Andrews project was nearing completion and almost one-hundred percent occupied with only a few buildings remaining to be finished and sold.

Deer Creek was completed in 2001. It consists of 64 dwelling units all of which are single story ranch style homes. The only permanent "deficiency" identified by Zook in the design and construction of the Deek Creek units at the time of his visit that Plaintiffs allege violates the FHAA are master baths which do not have requisite maneuvering space around the toilet or shower. At the time of Zook's inspection only eight units at Deer Creek had been completed. Defendants contend that upon receipt of Zook's Deer Creek compliance

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[4] According to Zook's report, the common use areas at Olde St. Andrews include a pool, clubhouse, sidewalks and parking areas.

review, Defendant Brown modified the plans so that the remaining 56 units comply with the HUD guidelines in every respect.

II.

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute is genuine when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The issue is whether the evidence submitted presents a sufficient disagreement about the material facts so that submission to trier of fact is necessary, or whether the evidence is so one-sided that a party must prevail as a matter of law. *Id.* at 251-52.

III.

Before considering any other issue, the Court first addresses whether Plaintiffs have standing to maintain this action, *See American Fed'n of Gov't Employees, Council of Prison Locals, Local 1286 v U.S. Dept. of Justice*, 738 F.2d 742, 748 (6th Cir. 1984). The standing inquiry generally entails a two-step analysis involving "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (*quoting Warth v. Seldin*, 422 U.S. 490, 498 (1975)). However, the Court need not consider the "prudential standing" requirements in this case because Congress has declared that standing under the Fair Housing Act extends to the full limits of Article III. *See Havens Realty Corp, v. Coleman*, 455 U.S. 363, 372 (1982). To satisfy the standing requirement of Article III, "a plaintiff must, generally speaking, demonstrate that he

has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett,* 520 U.S. at 162 (*quoting Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

A.

To understand how this general rule applies to organizations such as Plaintiffs, it is necessary to consider in some detail the facts and rulings of five key cases.

The foremost of these cases is *Havens Realty Corp. v. Coleman.* In *Havens,* the Supreme Court specifically addressed the injury requirement for organizational standing under the FHAA. *Id.* at 363. There, a realty company and one of its employees were alleged to have engaged in racial "steering" in violation of the Fair Housing Act. *Havens,* 455 U.S. at 366. The plaintiffs included a housing organization, Housing Opportunities Made Equal ("HOME"), whose mission was very similar to Plaintiffs' mission. *Id.* at 368. HOME alleged that the defendant's racial steering practices "frustrated the organization's counseling and referral services with a consequent drain on resources." *Id.* at 369. The district court had sustained defendant's motion to dismiss on standing grounds. The Supreme Court held that the type of injury alleged by HOME was sufficient for the purposes of establishing a cognizable Article III injury at the initial pleading stage:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact.

> Such concrete and demonstrable injury to the organizations's activities -- with the consequent drain on the organizations's resources--constitutes far more than simply a setback to the organization's abstract social interests.
>
> *Id.* at 379.

Eight years after *Havens,* then Judge Ruth Bader Ginsburg, writing for the D.C. Circuit Court, provided an extensive discussion of organizational standing under the Fair Housing Act in *Spann v. Colonial Village, Inc.,* 899 F.2d 24 (D.C.Cir. 1990). The plaintiffs were non-profit organizations "dedicated to ensuring equality of housing opportunity through education and other efforts." *Id.* at 26. They alleged that an advertising agency and the owner and manager of a residential condominium development ran discriminatory housing advertisements in *The Washington Post* in violation of the Fair Housing Act. *Id.* The plaintiffs also alleged that these discriminatory ads required plaintiffs to "devote scarce resources to identify and counteract defendants' advertising practices" and also required "increased educational efforts" to inform the public about laws prohibiting discrimination in housing. *Id.* at 28. Once again, the district court had dismissed the action on standing grounds. *Id.* at 26. The D.C. Circuit reversed, finding that educational programs "could plausibly be required" to counteract defendants' conduct and that these programs would act as a drain on the organizations' resources. *Id.* at 28-29. Therefore, plaintiffs' allegations were sufficient to establish standing to sue. *Id.* at 28-29, 31.

The court, however, specifically rejected the notion that an organization could "manufacture"

standing by alleging that the costs of the litigation itself comprise it[s] injury: "[a]n organization, cannot of course, manufactu[re] the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation." *Id.* at 27. A plurality of other circuits, at least, have adopted a similar view. *See also, Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers,* 141 F.3d 71, 79 (3rd. Cir. 1998) ("We align ourselves with those courts holding that litigation expenses alone do not constitute damage sufficient to support standing."); *Louisiana ACORN Fair Housing v. LeBlanc,* 211 F.3d 298, 305 (5th Cir. 2000) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization."); *Walker v. City of Lakewood,* 272 F.3d 1114, 1124 n.3 (9th Cir. 2001) ("Because we agree that a plaintiff cannot establish standing simply by filing its own lawsuit, we will not consider the time and money the FHF has expended in prosecuting this suit in deciding if the FHF has standing.").

Not all circuits have reached the same conclusions as *Spann,* however. The Seventh Circuit held that organizational standing can flow automatically from the expenses associated with litigation. *See Village of Bellwood v. Dwivedi,* 895 F.2d 1521 (7th Cir. 1990). In *Bellwood,* a real estate brokerage firm and two of its employees were sued for discriminatory practices alleged to violate the Fair Housing Act. *Id.* at 1525. On appeal of a jury verdict in favor of the plaintiffs, the court considered whether the organizational plaintiff had Article III standing to sue under the Fair Housing Act. *Id.* at 1525. Also, relying on *Havens,* the Seventh Circuit held that the organization

did have standing because the "only injury which need be shown to confer standing on a fair housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination." *Id.* at 1526. Notably, the Seventh Circuit imposed no requirement that the injury be independent or separate from the litigation. *See also, Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2nd Cir. 1993).

Without significant elaboration or discussion, the Sixth Circuit referenced the *Spann* approach in *Housing Opportunities Made Equal Inc., v. Cincinnati Enquirer, Inc., a Division of Gannett Co., Inc.*, 943 F.2d 644 (6th Cir. 1991). The Sixth Circuit held that in a Fair Housing Act case an organization must allege that the defendant's discriminatory conduct has caused it to suffer some injury "independent of its suit challenging the action." *Id.* at 646. However, the court gave minimal treatment to the standing issue. It held only that allegations that the defendant's discriminatory housing advertisement had "deterred potential renters from seeking housing at the advertised complexes" which in turn caused the plaintiff "to devote resources to investigate and negate the impact of these advertisements" were sufficient for standing purposes. *Id.* The Court did not discuss precisely what other types of allegations are sufficient to establish an injury independent of the litigation.

The Sixth Circuit revisited the question of organizational standing under the Fair Housing Act in *Hooker v. Weathers*, 990 F.2d 913 (6th Cir. 1993). In *Hooker*, the managers and owners of a trailer park were sued for discriminating against individuals on the basis of familial status in violation of the Fair Housing Act. *Id.* at 914-15. The complaint alleged that the Hookers, a married couple, owned a trailer located at the Shamrock Motel and Trailer Park managed by defendant Terry

Weathers. *Id.* at 914. After Mr. Hooker's elderly father moved out of the trailer, the Hookers tried to rent or sell the trailer. *Id.* The Hookers alleged that the defendants frustrated these efforts by discriminating against prospective renters and buyers on the basis of age and familial status. *Id.* Mr. Hooker contacted plaintiff, the Fair Housing Contact Center ("FHCS"), concerning his difficulties. *Id.* In an affidavit, Hooker alleged that as a result of his complaint the FHCS investigated the trailer park by sending a tester to inquire about moving into the trailer. *Id.* The tester was allegedly told that she was too young to rent the trailer. *Id.* As a result, the Hookers and FHCS filed suit. *Id.* The district court granted defendants' motion to dismiss for lack of standing. The only allegations of actual injury suffered by the FHCS centered around its pre-litigation investigation. *Id.* at 914-15. Again citing *Spann*, the Sixth Circuit summarily found that such allegations were sufficient to satisfy the Article III injury in fact requirement:

> According to the complaint, "Fair Housing Council Service conducted an investigation, and confirmed the facts and circumstances alleged [in the complaint]." FHCS devoted resources to investigating the defendants' practices and alleges that it has confirmed that defendants do discriminate on the basis of familial status. Therefore, FHCS has standing.

Id. at 915. On its face, Plaintiffs here appear to have alleged a similar level of "injury" as the *Hooker* plaintiffs. The Sixth Circuit has not considered another FHAA organizational standing case since *Hooker*.

Another significant factor in the standing analysis is that the Court now considers the issue on

summary judgment.[5] While there can be no dispute that the Plaintiffs' injury allegations were sufficient to withstand a motion to dismiss, (Memorandum Order of 02/12/1999 at R. 13), something more than mere allegations is required at the summary judgment stage. *See Fair Housing Counsel of Suburban Philadelphia,* 141 F.3d at 76. "Since the elements of standing are not mere pleading requirements but rather an indispensable part of plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.* with the manner and degree of evidence required at the successive stages of litigation." *Id.* (*citing Lujan,* 504 U.S. at 561). Even the *Havens* Court was careful to point out that HOME would have to produce actual evidence to support its allegations if it wanted to prevail on the standing issue at a later stage in the litigation. *Havens,* 455 U.S. at 379 n.21. Other courts have also noted the need of evidentiary support for injury allegations.[6] *See, e.g., Arkansas ACORN Fair Housing,*

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[5] This not the first the first time the Court has considered this issue during the course of this litigation. After Plaintiffs filed their complaint, Defendants moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) arguing that the action should be dismissed because Plaintiffs did not meet the standing requirements of Article III. After reviewing Plaintiffs' complaint and applicable case law, the Court denied Defendants' motion because Plaintiffs' complaint was fraught with buzzwords and phrases from *Havens* and *Spann*. The Court was careful to note, however, that "if the evidence adduced later demonstrates that plaintiffs' injuries were related only to bringing this lawsuit, the Court will revisit a properly raised challenge to the plaintiffs' standing at that time." (Memorandum Order of 02/12/1999 at R.13.)

[6] In *Spann*, for instance, it appears that plaintiffs submitted numerous affidavits setting out in some detail the kinds of

Inc. v. Greystone Development, Ltd. Co., 160 F.3d 433, 434 (8th Cir. 1998).

B.

Plaintiffs do not support their standing claim with affidavits and only Defendants appear to cite to the depositions of Plaintiffs' employees. Without a single citation to the record, Plaintiffs categorized their injuries in the following manner:

> Because of the Defendants' actions, the Plaintiffs were forced to divert resources away from education and housing counseling programs to investigate and attempt to counteract the discrimination against persons with disabilities carried out by the Defendants. Specifically, prior to this litigation, the Plaintiffs recruited disabled testers to investigate the violations of the Fair Housing Act at the subject properties, developed a new testing methodology for investigating accessibility violations, trained testers in the methodology, made numerous site visits to the subject properties, assigned testers, made copies of test forms, debriefed testers, conducted research into the designers and developers of the subject properties, reviewed the plans of the subject properties, conducted legal research into the accessibility requirements of the Fair Housing Act, in addition to dozens of other activities prior to litigation. These activities diverted both the Plaintiffs' monetary and human resources

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organization damage attributable to defendants' FHAA violations. *Spann*, 899 F.2d at 28-29.

> away from other projects. Plaintiffs had to suspend certain education enforcement, and counseling projects to divert staff time and money to this case. Specifically, the Fair Housing Counsel had to divert resources away from its education projects, including the *National Fair Housing Advocate,* its annual school desegregation report, its local newsletter concerning fair housing issues, and other staff reports and activities. Because of the enormity of this case, and the multiple accessibility violations present at the subject properties, the Fair Housing Counsel was forced to divert a good deal of the resources available under its enforcement program to the investigation of the Defendants and the subject properties.

(Pls.' Resp. Defs.' Mot. Summ. J. at 6-7.)

The Court first addresses Plaintiffs' claim that they were damaged by having to divert funds from other projects such as education and counseling to fund this litigation. This appears to be the very type of "manufactured" injury *Spann* declined to accept because the costs associated with the pursuit of litigation alone cannot create an injury sufficient to establish standing under Article III. *See Spann,* 899 F.2d at 27. In any event, Plaintiffs' claim probably fails for a lack of proof. Although pressed to do so in discovery and oral argument, Plaintiffs could only identify that the potential costs associated with litigation generally effected publication of the *National Fair Housing Advocate,* their annual school desegregation project and their local newsletter concerning fair housing issues. But they do not quantify, or even identify, the resources diverted from these programs or describe the effect this

litigation had on these programs. Furthermore, the actual evidence adduced during discovery strongly contradicts Plaintiffs' diversion claim. Plaintiffs generally received two separate funding grants from HUD, one for enforcement activities, and one for education activities. Plaintiffs were not funded for educational projects between September 15, 1998, and 2001. Thus, it appears that a dearth of funding for educational programs actually prevented continued publication of the *National Fair Housing Advocate* and curtailment of Plaintiffs' other educational programs not the costs associated with this litigation.

Plaintiffs' claim that they suffered cognizable injury when forced to expend resources to investigate Defendants' alleged discriminatory conduct is a much closer question. The record reveals that the "investigation" to which Plaintiffs refer consisted of training and sending three testers to the Olde St. Andrews development to conduct on-site accessibility tests. Plaintiff CAL supplied the testers, and Plaintiff FHC paid the testers $25 dollars each.[7] Each tester was also paid approximately $25 for training prior to

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[7] Because Plaintiffs did not include any citations to the record in their briefs, the Court had to extensively review deposition testimony and other discovery related documents. Organizational plaintiffs should bear in mind that standing is not an issue to be taken lightly. An organization should not assume that it automatically has a right to litigate a Fair Housing Act claim merely because the organization is theoretically opposed to housing discrimination. Article III standing is necessary in every case. In fact, the Court has an affirmative obligation to ensure that all plaintiffs have standing even where the issue is not raised by the parties themselves. *See In re Cannon*, 277 F.3d 838, 852 (6th Cir. 2002) ("Constitutional standing 'is always a threshold inquiry' that a court must consider before exercising jurisdiction.") (*quoting Newsome v. Batavia Local Sch. Dist.*, 842 F. 2d 920, 922 (6th Cir. 1988)).

conducting the test. (Baize Dep. at 7-8). This is the only actual evidence the Court finds in the record that supports Plaintiffs' allegations of investigation costs incurred prior to litigation.

Relying heavily on *Spann*, Defendants argue that this type of evidence is insufficient because the Plaintiffs' "investigation" was undertaken solely in anticipation of litigation, was an essential part of the litigation itself and, therefore, was not *independent* of the injuries associated with the litigation itself. *See Spann*, 899 F.2d at 27. Defendants contend that the pre-litigation investigation in this case is just as "manufactured" as the cost of the litigation itself, and will render the Article III requirements meaningless because any organization can create standing merely by "investigating" the claim before filing suit. Defendants' argument has a good deal of appeal, especially in this case. If it was not for this rule, any organization could manufacture Article Ill standing merely by filing suit. *See id.* Here it appears that Plaintiffs' investigation efforts were no more than a necessary precursor of this litigation. As Defendants point out, after the investigation Plaintiffs did not even make an attempt to contact any of the Defendants before filing this lawsuit.

Although Defendants arguments are very persuasive, the Court cannot ignore that in *Hooker* the Sixth Circuit found standing in a case very similar to the present. *See Hooker*, 990 F.2d at 915. There, the only apparent allegation of injury was pre-litigation investigation expenses for testers who confirmed defendants' allegedly discriminatory conduct. *Id.* 914-15. Although not entirely clear, the *Hooker* plaintiff appears not to have taken any action based on its investigation other than filing suit. *Id.* Citing *Spann*, that court held: "FHCS devoted resources to investigating the defendants' practices and alleges that it has confirmed that defendants do discriminate on the

basis of familial status. Therefore, FCHS has standing." *Id.* at 915. Although the opinion contains little discussion, the holding itself strongly suggests that the Sixth Circuit favors a less restrictive standing requirement for enforcement of the fair housing laws. Moreover, the result is consistent with the strong policy rationale that "the policies of the Act and the concrete injuries alleged by the plaintiff organization . . . intertwine to support plaintiff's standing to bring this suit." *Spann,* 899 F.2d at 31.

If it were not for the *Hooker* opinion, the Court would almost certainly conclude that the pre-litigation investigation in this case is insufficient to establish standing under Article III. However, following *Hooker* the Court concludes that Plaintiffs having standing by virtue of the expenses they incurred in conducting their pre-litigation investigation.

IV.

Defendants argue that they are entitled to judgment as a matter of law because the FHAA does not cover any of the units in the three subject developments. To answer this question, the Court first turns to the applicable provisions of the Act. The design and construction requirements of the FHAA apply only to new construction of multifamily dwellings built for first occupancy after 1991. *See* 42 U.S.C. § 3604(f)(3)(C). As used in this section of the FHAA, "covered multifamily dwellings" mean: "(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and (B) ground floor units in other buildings consisting of 4 or more units." 42 U.S.C. § 3604(f)(7). None of the buildings in Defendants' developments contain elevators. Thus, the applicability of the FHAA in this case depends on whether Defendants' ground floor units are located in buildings consisting of 4 or more units. *See id.*

Defendants argue that its homes or units are not constructed in "buildings of consisting of 4 or more units" because the homes are structurally separate from one another. Defendants' homes are clustered together in a pin-wheel design. There are 4 homes in each pin-wheel. Defendants maintain that the clusters should be considered as 2 separate buildings consisting of 2 homes each joined in the middle by 4 garages because 2 separate foundations are laid for each cluster. Defendants admit that each cluster of 4 homes shares the same roof. Therefore, if the Court were to accept Defendants' argument, the design and construction requirements of the FHAA would govern none of Defendants' units because the buildings contain less than 4 units. *See id.* The FHAA does not directly address whether Defendants' configuration should be considered a single building of 4 homes or 2 separate buildings of 2 homes each.

HUD is the federal agency primarily charged with the implementation and administration of the FHAA. *See* 42 U.S.C. § 3608. Congress directed HUD to provide technical assistance in the implementation of the requirements of 42 U.S.C. § 3604(f)(3)(C). *See* 42 U.S.C. § 3604(f)(5)(C). HUD, thereafter, issued Fair Housing Accessibility Guidelines (the "Guidelines") which are set forth at Vol. 56, No. 44 Fed.Reg. at 9472-9515 (March 6, 1991) (codified at 24 CFR Chapter 1, Subchapter A, Appendix II and III). The Guidelines specify that "dwelling units separated by firewalls do not constitute separate buildings" for purposes of the term "covered multifamily dwellings." 56 Fed.Reg. at 9480. Additionally, HUD's *Fair Housing Design Manual of 1998 ("Design Manual")* provides that:

> Dwellings built within a single structure but separated by a firewall are treated under the Fair Housing Act as a single building. For

> example, a structure containing two units on each side of a firewall would not be regarded as four two-unit buildings (and thus not covered by the Guidelines) but as a single eight-unit building. In other situations where the dwelling units are connected, such as by stairs or a walkway that is structurally tied to the main body of the building for purposes of the Guidelines, they are considered a single building and ground floor units in such buildings without elevators are covered.

Design Manual at 10. Given the broad remedial purpose of the Fair Housing Act, the Court is persuaded that HUD's interpretation of the FHAA concerning multifamily dwellings is reasonable and entitled to deference.[8]

Defendants' units are structurally connected by a single roof. While the dwellings may be separated by a firewall, this fact does prevent them for being considered as a single building. *See* 56 Fed.Reg. at 9480; *Design Manual* at 10. Each cluster of 4 units must but

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[8] The Court should defer to HUD's official interpretation of the FHAA in its Guidelines so long as it appears reasonable. *See Meyer v. Holley*, ___ U.S.____, 123 S.Ct. 824, 830 (2003) (stating that HUD's interpretation of FHAA was entitled to deference under *Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984) so long as HUD's interpretation was reasonable); *see also, Trafficante v. Metropolitan Life Ins*, 409 U.S. 205, 210 (1972) (stating specifically that HUD's interpretations of the language of the Fair Housing Act are entitled to great weight.) Furthermore, informal agency interpretations such as the Design Manual while not necessarily entitled *Chevron*-style deference are "entitled to respect . . . to the extent that those interpretations have the power to persuade." *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

be considered a single building for purposes of the design and construction requirements of FHAA. Accordingly, all Defendants' units are covered by the Act with the exception of the multi-story units.[9]

V.

Defendants argue that even if the Court concludes that all three developments are subject to the FHAA, Plaintiffs' claims as to all but nine of the units at Greenhurst are barred by the applicable two year statute of limitations. The sales on these units closed prior to October 6, 1996, more than two years before this action was filed. Plaintiffs argue that the continuing existence of FHAA non-compliant buildings constitutes a continuing violation under the FHAA. Once again, the Court begins its analysis with the plain language of the statute.

A plaintiff must file a FHAA complaint within two years after the "occurrence or termination of an alleged discriminatory housing practice . . . whichever occurs last." 42 U.S.C. § 3613(a)(1)(A). "[T]he plain language of the FHA indicates that an act, whether one in a series of many, or a single discrete occurrence, is necessary within the limitations period or the claim falls outside of the statute of limitations." *Moseke v. Miller and Smith, Inc.*, 202 F.Supp.2d 492, 503 (E.D. Va. 2002) (analyzing plain language of FHAA's statute of limitations).

Accordingly, the Court must determine what discriminatory "act" is actually at issue here. The FHAA makes it unlawful to "discriminate in the sale or rental,

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[9] Multi-story units are not covered and do not have to comply with the design and construction requirements of the FHAA. *See Design Manual* at 9 ("To be a covered unit, all of the finished living space must be on the same floor, that is, be a single-story unit.")

or otherwise make unavailable or deny a dwelling to any buyer or renter" or "to discriminate against any person in terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling" on the basis of a handicap. *See* 42 U.S.C.§§ 3604(f)(l)-(2). Discrimination includes: "in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1998, a failure to design and construct those dwellings in such a manner" as prescribed by the FHAA. *See* 42 U.S.C.§ 3604(f)(3)(C). Plaintiffs maintain claims under this subsection. Thus, the "act" at issue here is the design and construction of covered multifamily dwellings for sale or rental. The Court must determine when the last "act" of discrimination occurred, which must not be confused with the last effects of the discrimination. "The proper emphasis here must remain on Defendant's acts (*i.e.*, the design and construction of non-compliant buildings), rather than the continuing effects (*i.e.*, the continuing inaccessible features) that those acts caused." *Moseke,* 202 F.Supp.2d at 505.

In *Havens* the Supreme Court recognized that "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely filed" when it is filed within two years of the last asserted occurrence of that practice. *Havens,* 455 U.S. at 380-81. Here, the unlawful practice at issue is the design and construction of multifamily housing for sale or rental. The last asserted occurrence of the practice in the Greenhurst development complex occurred when the last unit was sold which occurred within two years of this suit. *See Baltimore Neighborhoods, Inc., v. Rommel Builders, Inc.,* 40 F.Supp.2d 700, 710 (D. M.D. 1999) (holding that

Fair Housing Act statute of limitations begins to run in design and construction cases with the sale of last allegedly deficient unit). Because at least one incident of alleged discrimination occurred during the limitations period, none of Plaintiffs' claims are barred by virtue of the continuing violation doctrine. *See Havens*, 455 U.S. at 381. The continuing violation doctrine does in fact apply so long as there is some ongoing *act* being performed as it pertains to the design and construction of the development.[10] The mere existence of a non-compliant building, however, is not an act. *But see, Eastern Paralyzed Veterans Assoc. v. Lazarus-Burman Associates*, 133 F.Supp.2d 203 (E.D.N.Y. 2001) (holding to the contrary without significant analysis). The statute of limitations for organizations alleging this type of discriminatory practice begins to run in design and construction cases as to the entire development when the last unit is sold because this is the last occurrence of discrimination.[11]

VI.

Finally, the Court turns to Plaintiffs' argument that they are entitled to summary judgment on liability for Defendants' failure to comply with the design and construction requirements of the FHAA as related to usable doors, placement of outlets and switches, usable

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[10] Therefore, it is not that the continuing violation doctrine does not apply at all in design and construction cases as Defendants argue, or that the statute of limitations never begins it run so long as the offending buildings remain non-compliant as Plaintiffs argue.

[11] When the statute would begin to run for an individual would necessarily depend on the specific allegations in the complaint. That is whether the individual were challenging a discrete act of discrimination or a practice. *See Havens*, 455 U.S. at 381. Nevertheless, this issue is not properly before the Court at this time.

kitchens and bathrooms, interior door width, and bathroom grab bar reinforcement. The design and construction requirements of the FHAA include making public use and common use areas "readily accessible and usable by handicapped persons," making doorways wide enough to accommodate wheelchairs, as well as enumerated "features of adaptive design" including an accessible route into and through the dwelling, switches and other controls in accessible locations, reinforcement in bathroom walls to allow later installation of grab bars, and usable kitchens and bathrooms so that a wheelchair can maneuver about the space. *See* 42 U.S.C. § 3604(f)(3)(C)(i)(ii)(iii). The FHAA does not specifically set out exact standards builders and designers must follow to be in compliance with the Act. HUD promulgated the Guidelines, in part, to give builders some guidance in how to comply with Act.

Plaintiffs base their argument entirely upon the fact that the units in Defendants' developments do not comply with the design and construction "requirements" contained in HUD's Guidelines. The Guidelines, however, are not mandatory. *See* 56 Fed.Reg. at 9472. "The purpose of the Guidelines is to describe minimum standards of compliance with the specific accessibility requirements of the Act." *Id.* at 9476. A failure to meet the requirements as interpreted in the Guidelines does not constitute unlawful discrimination. *See id.* The Guidelines are "intended to provide a safe harbor for compliance with the accessibility requirements of the Fair Housing Amendments Act . . . Builders and developers may choose to depart from the Guidelines, and seek alternate ways to demonstrate that they have met the requirements of the Fair Housing Act." *Id* at 9473. Therefore, while the Guidelines may be of some relevance, they are not decisive. The real question that must be resolved is whether the units and common

areas as designed are reasonably accessible to most handicapped persons.

Defendants conceded during oral argument that the steps at the entrance thresholds of the units as well as steps at some entrance sidewalks render these areas inaccessible to wheelchair users. As to all other of Plaintiffs' contentions, a trial is necessary to resolve accessibility issues. The Court cannot grant summary judgment for Plaintiffs where the only uncontested evidence presented by Plaintiffs is a failure to meet the requirements set out in HUD's Guidelines.

The Court will enter an Order consistent with this Memorandum Opinion.

\s\ John G. Heyburn II
JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

ENTERED
March 14 2003
JEFFREY A. APPERSON, CLERK
BY
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:98-CV-630-H

FAIR HOUSING COUNCIL, INC., ET AL
PLAINTIFFS

v.

VILLAGE OF OLDE ST. ANDREWS, INC., ET AL.
DEFENDANTS

ORDER

The Court has considered the parties cross motions for summary judgment on various issues. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' Partial Motion for Summary Judgment as to Liability is DENIED.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is DENIED.

This 14th day of March, 2003.

\s\ John G. Heyburn II
JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

ENTERED
March 14 2003
JEFFREY A. APPERSON, CLERK
BY
DEPUTY CLERK

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Fair Housing Council, Inc., et al.	:	
PLAINTIFFS,	:	
v.	:	Case No.: 3:98cv-630 H
Village Of Olde St Andrews, Inc., et al.	:	
DEFENDANTS.	:	

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AFFIDAVIT OF JOHN CLARK,

COMES NOW John Clark, being duly sworn by the below signed attesting officer authorized to administer oaths in the Commonwealth of Kentucky and states and deposes as follows:

1. I have been employed at the Jefferson County Code Enforcement Division in Louisville, Kentucky since 1984. I was employed as a Plan Reviewer/Commercial Inspector from 1984 to present. My responsibilities included the review of proposed buildings plans for conformity with the state building code (BOCA) as well as numerous local ordinances.

2. WKB Associates, Inc., a local builder, submitted plans for a patio-home development called Greenhurst at least on other plans for this

development was submitted by architect Ken Brown later.

3. One set of plans included "handicap accessibility notes."

4. The Jefferson County Code Enforcement office reviewed these plans. I did not know that it was necessary to incorporate the HUD features detailed by the handicap accessibility notes. These state that they are produced by the Department of Housing and Urban Development. I was not aware of any legal requirement that multi-family or other housing conform to the handicap accessibility notes. When I reviewed the plans, I thought that the sheet included by Epcon only applied to HUD or FHA funded housing.

5. To my knowledge, neither HUD nor any other party ever communicated with the Jefferson County Code Enforcement regarding the enforcement of the Fair Housing Act of 1968 as amended, 42 USC §§3601 et seq., or handicap accessibility guidelines promulgated by HUD pursuant to this law, prior to November 7, 2002. Accordingly, we have not advised builders such as WKB Associates, Inc. of this law's requirements to date. We do advise builders of the Americans with Disabilities Act of 1990, 42 USC §12101 et seq. and have incorporated its requirements into BOCA.

6. The Jefferson County Code Enforcement office gave WKB Associates a building permit for Greenhurst. WKB also submitted plans for the Village of Olde St. Andrews and Deer Creek projects. Permits were issued for those buildings again.

FURTHER AFFIANT SAYETH NOT

\s\ John Clark
John Clark

Sworn to and subscribed before me this 26 day of November, 2002.
My commission expires: 11-5-2003.

\s\ Janice M. Johnston
Notary Public

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

FAIR HOUSING COUNCIL INC., et al. PLAINTIFFS	)	
v.	)	Case No. 3:98cv-630 H
VILLAGE OF OLDE ST ANDREWS, INC., et al. DEFENDANTS	)	

PLAINTIFFS' RESPONSES TO DEFENDANTS' FIRST INTERROGATORIES AND REQUESTS TO PRODUCE TO PLAINTIFFS

Come the Plaintiffs, Fair Housing Council, Inc. and Center for Accessible Living, Inc., by counsel, and for their Responses to Defendants' First Interrogatories and Requests to Produce to Plaintiffs, state as follows:

INTERROGATORIES

Interrogatory No. 1: Please state the full name, business address, and title or position within the Plaintiff organization of the person answering these interrogatories.

Response: C. Alex E. Rose, Staff Attorney, Fair Housing Council, Inc., 835 W. Jefferson St., Suite 100, Louisville, KY 40202; Tony Baize, Assistant Director, Fair Housing Council, Inc., 835 W. Jefferson St., Suite 100, Louisville, KY 40202; Tom Ebendorf, Barber,

Banaszynski & Associates, 100 North Sixth Street, Fifth Floor, Louisville, KY 40202.

Interrogatory No. 2: State all facts on which you base your contention that the Defendants' alleged violations of the Fair Housing Act have resulted in impairment of your organization's ability to carry out its mission, identifying each piece of evidence upon which you rely.

Response: The mission and purposes of the Fair Housing Council (FHC) include the investigation and eradication of housing discrimination, and the encouragement of nondiscriminatory housing practices through education and enforcement. As a part of this mission, the FHC endeavors to eliminate housing discrimination against individuals with disabilities by ensuring compliance with laws intended to provide access to housing. Units constructed at the Defendants' developments at The Village of Deer Creek (hereinafter "Deer Creek"), the Village of Olde St Andrews (hereinafter "St. Andrews"), and Greenhurst Condominiums (hereinafter "Greenhurst") directly oppose and impair the mission of the FHC.

The Mission of the Center for Accessible Living, Inc. (CAL) is to assist in providing an environment that supports individuals with disabilities in attaining independent living and the right to choose his or her personal degree of independence. This includes, but is not limited to: advocating for the expansion of the range of independent living options available to persons with disabilities; educating service and housing providers, public officials, and the general public as to the needs of persons with disabilities; administering programs to assist persons with disabilities in seeking and obtaining an independent lifestyle; and advocating for the full exercise of the statutory and constitutional rights of

persons with disabilities. Units constructed at the Defendants' developments at Deer Creek, St. Andrews, and Greenhurst directly oppose and impair the mission of the CAL.

Housing discrimination includes, in connection with the design and construction of covered multifamily dwellings for first occupancy after March 13, 1991, a failure to design and construct those dwellings to be accessible to disabled persons, including persons in wheelchairs. The rationale behind this proposition is clear, as "a person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as a posted sign saying 'No Handicapped People Allowed.'" H.R. Rep. No. 711 at 25 (1988). Buildings that are constructed in violation of the Fair Housing Act's accessibility guidelines are considered ongoing violations of the Act, or, in other words, ongoing instances of discrimination.

The Plaintiffs believe that some of the covered, multifamily dwellings at Deer Creek, St. Andrews and Greenhurst were constructed in violation of the law, and are therefore ongoing violations of the law. Thus these dwellings directly impair the FHC's overarching mission of eradicating housing discrimination, and directly impair CAL's efforts to assist persons with disabilities in seeking and obtaining an independent lifestyle. Furthermore, these developments will continue to impair the Plaintiffs' missions unless all units therein are modified to comply with the law. If the Defendants' developments remain inaccessible, the Plaintiffs cannot hope to eradicate housing discrimination, in light of the fact that these inaccessible units are themselves ongoing instances of discrimination.

The FHC's mission also includes ensuring compliance with laws intended to provide access to housing. The Defendants have frustrated and impaired the efforts of the FHC in this respect by constructing buildings in direct violation of the laws that the FHC seeks to enforce. Defendants' construction of, and subsequent resistance to modifying, these buildings have frustrated the FHC's efforts to ensure compliance with fair housing laws, and will continue to do so until each noncompliant unit is retrofitted to satisfy the requirements of the Fair Housing Act.

The Defendants' inability or unwillingness to modify the inaccessible units at Deer Creek, St. Andrews, and Greenhurst also present what is perhaps the greatest conceivable frustration to the mission of each Plaintiff: the Defendants have committed acts of discrimination and violations of fair housing laws that will likely last well beyond the resolution of this matter, even if the Plaintiffs prevail in this action. Unlike common legal actions grounded in housing discrimination, a victory by the Plaintiffs here will not achieve the cessation of the discriminatory acts in question, i.e. a comprehensive modification of each inaccessible unit at the Defendants' developments. It is thus quite probable, if not certain, that the Plaintiffs' missions will continue to be frustrated far beyond the conclusion of this lawsuit, inasmuch as many of the units at the Defendants' developments will remain inaccessible.

Further frustration of the Plaintiffs' missions stems from the fact that the Defendants filed two separate sets of plans with the Jefferson County Division of Code Enforcement for each development at issue in this litigation. For each development, one set of the plans filed with the Code Enforcement office contained both reference to, and partial adherence to,

the Fair Housing Act, while the other did not. This implies to the Plaintiffs that the Defendants knew about the requirements of the Fair Housing Act, yet disregarded these requirements and proceeded to build inaccessible units. Such action clearly frustrates the Plaintiffs' missions to effectively enforce the Fair Housing Act and ensure that individuals with disabilities may attain independent living.

The Plaintiffs' mission to ensure fair housing for the disabled was also impaired by the Defendants' policy of charging residents fees to retrofit the inaccessible features of their homes, which should have been designed and constructed to be accessible. The Defendants therefore not only violated the Fair Housing Act by failing to build accessible units, but applying different terms and conditions to disable residents who wished to bring their homes into compliance with the law.

The acts of the Defendants have further frustrated the FHC's and CAL's efforts to educate the general public about the Fair Housing Act and the needs of persons with disabilities, by diverting resources explicitly reserved for educational and other purposes. Resources that were allocated for programs including the printing and distribution of the *National Fair Housing Advocate* (discussed in greater detail in Plaintiffs' Response to Interrogatory No. 10), conducting, attending, and/or speaking at seminars and presentations relating to housing for the disabled and/or the Fair Housing Act, tester training, and advice/referral services instead were spent in furtherance of this litigation.

Interrogatory No. 3: Did the Defendants' alleged violations of the Fair Housing Act impose a

drain on your organization's resources? If yes, describe the following:

a) The resources drained or diverted;
b) When they were drained or diverted;
c) Why or how the actions of the Defendants caused or imposed a drain on your organization's resources.

Response: Yes.

a) Refer to collated documents identified as Attachment No. 5, Bates Stamp Nos. 000989-001001.

b) Refer to collated documents identified as Attachment No. 5, Bates Stamp Nos. 000989-001001.

c) The FHC was not formed for the sole purpose of filing and pursuing housing discrimination complaints. The FHC engages in a variety of educational, counseling, testing, and referral services throughout Kentucky and Southern Indiana, many of which are described in Plaintiffs' Response to Interrogatory No. 4.

The acts of discrimination committed by the Defendants diverted the FHC's resources to the degree that several of the FHC's activities had to be de-emphasized, postponed, or even altogether discontinued.

When the FHC scouted the Defendants' developments and discovered potential violations, resources were diverted to test those developments in order to determine the extent and nature of any noncompliance with the Fair Housing Act. Had the Defendants' developments been

accessible, the FHC would not have had to test them and could have used its limited resources to test another development, thereby furthering our mission of promoting fair housing.

Each act of discrimination committed by the Defendants caused a setback to the good work accomplished by the FHC's previous educational and outreach efforts. In order to undo the damage caused by the Defendants' discriminatory actions, the FHC initiated several new projects. These projects included giving presentations at several local and regional events focusing on disability issues, increasing the number of accessibility and disability tests performed annually, recruiting additional disabled testers, and applying for a partnership grant with the CAL in order to increase our enforcement program's focus on disability and accessibility issues.

Additionally, for the purposes of this litigation alone, the FHC was forced to retain outside counsel so that employees with responsibilities unrelated to this case could return to those responsibilities. Staff members including the Publications Specialist, Test Coordinator, and Assistant Director devoted a significant amount of time to doing legal research and investigation, instead of performing the tasks detailed in their job descriptions (See Attachment No. 5, Bates Stamp Nos. 000989-001001.). Resources were also diverted from the FHC's education program, to the point that the FHC was no

longer able to publish or distribute the *National Fair Housing Advocate* or other local publications, including staff reports, brochures, and other educational materials. The diversion of these resources from the education program also impaired the FHC's ability to plan, conduct, attend and/or give presentations at events related to fair housing issues.

The FHC also had to divert funds that had been set aside for insurance testing to this litigation, and in turn the number of insurance tests that the FHC was able to perform was greatly reduced.

Interrogatory No. 4: Describe with particularity the work performed by your organization in 1997 and 1998, prior to bringing this lawsuit.

Response: In 1997 and 1998, the FHC was funded to engage in, and did in fact engage in, the following activities: pursued pending fair housing cases in court and before government commissions and HUD; recruited and trained new testers to supplement our established pool of testers; chose sites for testing based on complaints received, new construction, and investigation; provided fair housing enforcement training to staff; conducted single accessibility test-site surveys for newly constructed multi-family housing which required site visits by investigator; performed paired rental tests which required site visits by paired testers; conducted paired homeowners insurance tests requiring testers to make telephone contact with insurance agents; conducted single sales test visits requiring testers to contact development or real estate companies; performed an additional disability tests which required site visits by disabled testers requesting

reasonable accommodations and modifications; processed housing discrimination complaints; conducted investigations to support test results which show discrimination or differential treatment, including but not limited to document reviews, title searches, canvassing, witness identification and interviewing, reverse telephone searches, site visits, tape recording, and photographs; filed administrative complaints with HUD, the Kentucky Commission on Human Rights, and the Indiana Civil Rights Commission and other local commissions based on evidence gathered during fair housing tests and complaint processing; filed lawsuits in state and federal court when appropriate; worked on improving the Analysis of Impediments in Louisville and Jefferson County in Kentucky and Clark, Floyd, and Harrison Counties in southern Indiana; focused enforcement on reducing community tensions by providing legal assistance to individuals or groups promoting desegregation; and administered and hosted www.fairhousing.com, a free website containing fair housing information such as statutory and regulatory materials, including accessibility guidelines.

Interrogatory No. 5: Did the Plaintiffs receive any complaints from purchasers or potential purchasers of homes developed by WKB Associates prior to filing this law suit? If yes, please provide the following:

a) The identity of any person making such a complaint;
b) The date on which the complaint was received by the Plaintiffs;
c) The nature of the complaint.

Response: No.

Interrogatory No. 6: Did the Plaintiffs receive any complaints from purchasers or potential purchasers of homes developed by WKB Associates prior to

investigating the Defendants regarding their alleged violations of the Fair Housing Act? If yes, please provide the following:

a) The identity of any person making such complaint;
b) The date on which the complaint was received by the Plaintiffs;
c) The nature of the complaint.

Response: No.

Interrogatory No. 7: Describe each action performed by your organization during the course of determining that it believed the Defendants to have committed violations of the Fair Housing Act, including but not limited to the following:

a) Identify the persons who investigated, or provided information to the Plaintiffs regarding the Defendants;
b) Provide the dates of each activity undertaken.

Response: See Attachment No. 5, Bates Stamp Nos. 000989-001001, for activities undertaken by employees of the FHC in determining that it believed that the Defendants had violated the Fair Housing Act. Activities undertaken by individuals who are not employees of the FHC are listed below. Because this Interrogatory did not limit the response to actions performed prior to filing the complaint, actions performed after the complaint was filed are included in the Response. Conversations with residents at the Defendants' developments provided the FHC with further information about the Defendants' violations of the Fair Housing Act. For the names of those residents and the dates and substance of those conversations, see Plaintiffs' Response to Interrogatory No. 15.

a)

i) Wallace Shotwell
ii) Myrna Byerly
iii) Rhonda Kidd
iv) Phil Zook.

b)

i) Wallace Shotwell performed a telephone contact and accessibility survey of St. Andrews on July 28, 1998. He completed his survey report and was debriefed on that date as well.
ii) Myrna Byerly performed an accessibility survey of St. Andrews and filled out her survey report on August 27, 1998. She was debriefed on September 1, 1998.
iii) Rhonda Kidd performed an accessibility survey of St. Andrews and filled out her survey report on August 27, 1998. She was debriefed on September 1, 1998.
iv) Phil Zook performed compliance evaluations of each of the defendant's developments on July 22, 1999. Defendants have already been provided with a copy of each of his reports.

Interrogatory No. 8: Did the Plaintiffs employ, retain, sponsor, or rely upon the work of any "testers" who approached the Defendants for the ostensible or actual purpose of purchasing a home during the course of their investigation prior to filing this law suit? If yes, state the following:

a) The identity of any testers or other persons who contacted the Defendants while cooperating with the Plaintiffs;
b) The dates of any contacts;

c) The information provided by any such persons to the Plaintiffs.

Response: Yes.

a)

i) Wallace Shotwell
ii) Nick Valenzuela
iii) Myrna Byerly
iv) Rhonda Kidd

Each of these individuals may be contacted through Tony Baize; Assistant Director of the FHC.

b)

i) Wallace Shotwell tested St. Andrews through both a site visit and a telephone contact on July 28, 1998.
ii) Nick Valenzuela tested St. Andrews through site visits on July 30 and August 7, 1998, and telephone contact on August 6, 1998. He tested Greenhurst through a site visit on October 8, 1998. Nick also tested Deer Creek through a site visit on December 9, 1998.
iii) Myrna Byerly tested St. Andrews through a site visit on August 27, 1998.
iv) Rhonda Kidd tested St. Andrews through a site visit on August 27, 1998.

c) Following the completion of each rental test/accessibility survey that they perform, testers are trained to proceed immediately to a secure location and fill out the Rental Test or Accessibility Survey Report Form provided by the Test Coordinator. Shortly thereafter, the testers are debriefed by the Test Coordinator. Rather than restate the information contained in these forms, a copy of each Report Form and Debriefing

Form used during the Plaintiffs' investigation of the Defendants is attached hereto as a part of Attachment No. 1, Bates Stamp Nos. 000000-000116.

Interrogatory No. 9: Have the Plaintiffs ever employed, retained, sponsored, or relied upon the work of any "testers" who investigated discriminatory housing practices? If yes, state the following:

a) How much they were paid;
b) What other complaints were filed pursuant to information collected by such persons?

Response: Yes.

a) Testers are paid $25 per test, and $25 for attending tester training.

b) Testing is a process that the FHC uses in the normal course of carrying out its business of investigating and eradicating housing discrimination. The FHC used the information gathered by its testers in roughly half of the lawsuits and administrative actions it has filed since 1995, when it began enforcing fair housing laws. Testing is performed on a systemic basis, as a component of a pattern and practice investigation, or pursuant to a complaint of discrimination received by the FHC. Active complaints filed by the FHC pursuant to information provided by its testers include *FHC v. Chatsworth Park Apartments, McGuire v. Parliament Square, David Hunt v. Bill Davis,* and *Eric Baker v. Bruce Hardesty* (before the Louisville and Jefferson County Human Relations Commission), and *Martinez v. University Woods/Dr. Landau, FHC v. Sunset Towers/Loo, and FHC v. Evansville Courier & Press et al.* (before the Indiana Civil Rights Commission). If the Defendants require an exhaustive list of each case filed by the FHC pursuant to information provided by

testers, such a list can be provided upon request after a comprehensive search through the FHC's case file archives.

Interrogatory No.10: Did the Plaintiffs make any effort to encourage nondiscriminatory housing practices through education of the Defendants prior to filing suit against them? If yes, describe these efforts.

Response: Yes.

Since 1991 the FHC has spent a great deal of its time and resources educating members of the general public, including individuals and companies involved in the design and construction of dwellings, about the Fair Housing Act and its requirements. The FHC educates the public about the Fair Housing Act and its requirements in hopes of encouraging nondiscriminatory housing practices. Whether or not the Defendants ever took advantage of any of the FHC's educational services is unknown.

Primarily, the FHC educates the public through a publication called the *National Fair Housing Advocate* ("the *Advocate*"). The FHC wrote, edited, published, and distributed this publication free of charge from the fall of 1991 until the fall of 1999. By that time, its readership had eclipsed 20,000 subscribers. This group of subscribers included many individuals and companies involved in the design and construction of dwellings, including architects and builders.

This free publication reported any significant developments in fair housing law, and additionally reported decisions and settlements in all cases involving fair housing issues. Roughly once a year, the *Advocate* published its "Disability & Accessibility Report," an entire issue dedicated to disability and accessibility

matters. The FHC does not believe that the Defendants subscribed to this free publication.

The FHC also administered and hosted www.fairhousing.com, a website containing fair housing information, including statutory and regulatory materials. The Fair Housing Act's accessibility guidelines and related materials have been available free of charge at this website since 1995. The Plaintiffs are unsure whether or not the Defendants utilized this service.

The FHC also plans, conducts, and/or gives presentations at events related to fair housing issues several times each year. Events at which representatives of the FHC have made presentations include the ADA Action Network Conference, The Metropolitan Housing Coalition's Fair Housing Month events, and meetings of the Paralyzed Veterans of America. The Plaintiffs are unsure whether or not the Defendants attended any of these presentations.

Additionally, the FHC sent public service announcements regarding fair housing rights and laws to radio stations throughout Kentucky in 1991 and again in 1998. Many of the stations played these announcements, which included a tag instructing persons who wanted to know more about fair housing to call the Fair Housing Council on its toll-free line. In May 1996, the FHC published notices of national fair housing disability law training open to the public with sessions to be held on both the East and West Coasts.

The Plaintiffs do not target specific builders to educate about the Fair Housing Act. The FHC assumes that it is in the best interest of the active members of the building community to educate themselves about what the law requires of them. The Plaintiffs provide more than ample opportunities for architects and

builders to learn about the Fair Housing Act and its requirements.

Finally, it is important to note that the FHC and CAL did not discover that the Defendants had violated the FHC until after construction of Greenhurst and St. Andrews had been completed, and several units had been occupied. At this point, the Defendants' had already violated the Fair Housing Act to the point where mere education would have had little or no effect on these violations.

Interrogatory No. 11: Did the FHC and/or CAL receive funding from the department of Housing and Urban Development or other sources for the purpose of enforcing or ensuring compliance with laws intended to provide access to housing by bringing suit against parties such as defendants? If yes, state the following:

a) Those instances in which your organizations brought such lawsuits;
b) The amount of such funding during 1997 and 1998;
c) The percentage of total funding for your organization which this constituted during those years.

Response: The FHC did receive such funding. The CAL did not.

a) *Rhonda Malone, et al. v. Patricia McLaughlin, et al.*, Case No. 3:96CV-495-J, United States District Court, Western District of Kentucky at Louisville; *Maria Delgado, et al. V. Ables & Hall Builders, Inc., et al.*, Case No. 3:98CV-160-S, United States District Court, Western District of Kentucky at Louisville; *Lexington Fair Housing Council, Inc. v. Nationwide*

Mutual Fire Insurance Company, et al., Case No. 96-365, United States District Court, Eastern District of Kentucky, Lexington Division; *John Hamby v. Tesco Properties, Inc., et al.*, Case No. 1:97CV-242-R, United States District Court, Western District of Kentucky, Bowling Green Division; *Charles Cousins, et al. v. Merle Allen, et al.*, Case No. NA 98-156-C D/S, United States District Court, Southern District of Indiana, New Albany Division; *Kentucky Fair Housing Council Inc., et al. v. Ameritech Publishing, Inc., et al.*, Case No. NA 96-106-C B/G, United States District Court, Southern District of Indiana, New Albany Division; *Kentucky Fair Housing Council, Inc. v. Albert Senn, Sr., et al.*, Case No. NA 96-105-C B/H, United States District Court, Southern District of Indiana, New Albany Division; *Anthony Haines, et al. v. Yvonne Halterman*, Case No. NA 97-197-C D/S, United States District Court, Southern District of Indiana, New Albany Division; *Louisville and Jefferson County Human Relations Commission, et al., v. Ulrich Kaulitz, et al.*, Case No. 98-CI-02722, Jefferson Circuit Court; *Kentucky Commission on Human Rights, et al. v. Paul E Wirth, et al.*, Case No. 97-CI-00523, Oldham Circuit Court. All other complaints filed by the FHC have been administrative actions, brought before various civil rights enforcement agencies.

b) The only enforcement grant received by the FHC in 1997-1998 commenced on December 1, 1997. It was a two year

enforcement grant in the amount of $349,997. A total of $189,581.73 of this grant applied to 1997 and 1998. The FHC's previous enforcement grant expired on November 16, 1996.

c) The FHC's enforcement grant constituted 70% total funding for 1997-1998. This grant was not solely intended for the purpose of bringing lawsuits and administrative complaints. Rather, the 1997-1998 enforcement grant was to be used in furtherance of the activities listed in the Plaintiffs' Response to Interrogatory No. 4.

Interrogatory No. 12: Did the FHC and/or CAL receive funding from the Department of Housing and Urban Development or other sources for the purpose of encouraging nondiscriminatory housing practices through the education of parties such as the Defendants? If yes, state the following:

a) Identify those instances in which your organization sought to educate parties such as the Defendants;

b) The amount of such funding during 1997 and 1998;

c) The percentage of total funding for your organization which this constituted during those years.

Response: The FHC did receive such funding. The CAL did not.

a) See Response to Interrogatory No. 10.

b) During 1997 and 1998, the Fair Housing Council worked from three separate education grants. The first began in July of 1995, and it expired in January of 1997.

$7,236.17 had been allotted for that month. The next education grant received by the FHC totaled $97,534, and was awarded by HUD for the purpose of administering www.fairhousing.com. This was an eighteen-month grant, which began on September 28, 1995, and expired March 28, 1997. A total of $16,255 had been allocated for the first three months of 1997. The final education grant received by the FHC to date began on March 15, 1997 and lasted until September 15, 1998. The total amount of that grant was $58,306.

c) The FHC's education grants constituted 30% of total funding for 1997 and 1998.

Interrogatory No. 13: State the amount of all funding received by your organization for the years 1998 and 1999, and the purposes for which such funding was provided.

Response: In 1998 and 1999, the FHC carried on its operation by using the remainder of its enforcement and education grants, which began on December 1, 1997 and March 15, 1997, respectively. The enforcement grant had a remainder of $335,413.79, while the education grant had a remainder of $29,153. The FHC received no new funding during 1998 and 1999.

Interrogatory No. 14: Identify each employee of your organization in 1997 and 1998, and describe the work of each employee.

Response:

1) Executive Director in 1997 and 1998 - Galen Martin, Executive Director, Fair Housing Council, Inc., 835 W. Jefferson

St., Suite 100, Louisville, KY 40202, (502) 583-3247;

JOB DESCRIPTION: Leads and directs staff. Provides information to media and other groups. Assists complainants with the filing of complaints and pursues them through public enforcement agencies and federal and state courts. Conducts educational programs, speaks to civic, civil rights and church groups about fair housing and desegregation. Seeks renewal of HUD funding and independent funding. Reports to and serves on a twelve member Board of Directors.

2) Publications Specialist in 1997 and 1998 - Tony Baize, Assistant Director, Fair Housing Council, Inc., 835 W. Jefferson St., Suite 100, Louisville, KY 40202, (502) 583-3247;

JOB DESCRIPTION: Prepares, scans, and edits copy for the *National Fair Housing Advocate* newsletter, which reports housing discrimination case settlements throughout the country. Helps build and update the newsletter mailing list. Conducts educational programs, speaks to civic, civil rights, and church groups about fair housing and desegregation. Reports to executive director.

3) Office Manager in 1997 and 1998 - Edna Segar, Office Manager, Fair Housing Council, Inc., 835 W. Jefferson St., Suite 100, Louisville; KY 40202, (502) 583-3247;

JOB DESCRIPTION: Prepares FHC correspondence. Keeps all accounts, writes checks, processes accounts payable, prepares payroll, payroll taxes, records and files all paid invoices, reconciles bank statements, prepares financial reports and all related record-keeping matters. Assists in preparing employee expense vouchers and HUD Product Reports. Records and transcribes board meeting minutes, and completes mailing to board members. Answers telephones and greets clients and the general public. Assists in general management of FHC office, and reports to the Executive Director.

4) Staff Attorney in 1997 and 1998 - Kevin Kijewski, Attorney, U.S. Department of Justice, Civil Rights Division, Housing and Civil Enforcement Section, P.O. Box 65998, Washington, DC 20035-5998; (202) 305-2913

JOB DESCRIPTION: Provides legal representation for victims of discrimination, as well as for the FHC itself, in legal proceedings in state court, federal court, and before state and local commissions. Authors pleadings, makes appearances, and performs other tasks inherent in instigating and maintaining an action based on discrimination. Attends the meetings of fair housing organizations in the area, and additionally performs outreach-oriented activities for the FHC, such as speaking to various civic, civil rights, and church groups about fair

housing and desegregation issues. Reports to Executive Director.

5) Test Coordinator in 1997 and 1998 - Nick Valenzuela, Compliance Specialist, Kentucky Housing Corporation, 1231 Louisville Road, Frankfort, KY 40601, (502) 564-9946.

JOB DESCRIPTION: Coordinates and implements a testing program to determine discrimination in housing rentals, insurance, sales, and mortgages. Recruits, selects and trains housing testers. Designs objective testing programs and keeps documentation. Analyzes test results and prepares reports on testing programs. Assists complainants with filing complaints. Conducts educational programs, speaks to civic, civil rights, and church groups about fair housing and desegregation. Reports to Executive Director.

Interrogatory No. 15: Identify each homeowner or prospective buyer at the Village of Olde St. Andrews, Greenhurst, Deer Creek, or any other WKB Associates project whom you have contacted. For each such person provide the method of each communication, the date of each communication, and the substance of each communication.

Response: Listed below are the method, date, and substance of each communication that the FHC had with homeowners at the Village of Olde St Andrews, Greenhurst, Deer Creek, and other WKB Associates projects. Because this Interrogatory requests this specific information for individuals that we contacted, we have not listed individuals that we were unable to

contact. Information regarding individuals that contacted the FHC has also been included.

Olde St Andrews

1) Shirley J. McDaniel, 3547 St. Andrews Village Circle

Method of Communication 1: Telephone

Date of Communication 1: May 7, 2001

Substance of Communication 1: The substance of our telephone conversation with Ms. McDaniel was the same as the letter she wrote to us the next day. That letter is summarized below.

Method of Communication 2: Letter to FHC

Date of Communication 2: May 8, 2001

Substance of Communication 2: Ms. McDaniel stated her 83 year-old mother was part of her home purchase planning. Ms. McDaniel explained that she had requested that her thermostat be lowered to 36" so that she could reach it from her wheelchair, but WKB wanted to charge her $75 for the adjustment. Ms. McDaniel made this request before the drywall was put up in her home. She still must have someone else adjust her thermostat. She paid for the lowering of light switches, lever hardware, bathroom modifications, and other accessibility features.

2) Stanley V. Benovitz, 8230 St. Andrews Village Drive

Method of Communication 1: Telephone

Date of Communication 1: On or about May 7, 2001

Substance of Communication 1: Explained that he had paid $225 for lever hardware, and that he wanted that amount refunded.

Method of Communication 2: Telephone

Date of Communication 2: On or about September 17, 2001

Substance of Communication 2: Informed the FHC that George Moore had died.

3) Richard Wagner, 3539 St. Andrews Village Circle

Method of Communication 1: Letter to FHC

Date of Communication 1: December 19, 2000

Substance of Communication 1: Complained that he had to pay for lever hardware in his unit. Explained that he believed that he was entitled to a refund under the law.

Method of Communication 2: Telephone

Date of Communication 2: December 20, 2000

Substance of Communication 2: Discussed lever hardware. Mr. Wagner told the FHC about Shirley McDaniel, a disabled tenant.

Method of Communication 3: Telephone

Date of Communication 3: On or shortly before May 4, 2001

Substance of Communication 3: Discussed amount he paid for lever hardware. Identified president of St. Andrews' board.

Method of Communication 4: Telephone

Date of Communication 4: March 7, 2001

Substance of Communication 4: Discussed lever hardware that he had installed in his unit.

Method of Communication 5: Telephone

Date of Communication 5: On or about October 2, 2001

Substance of Communication 5: A reporter from the Courier Journal took an interest in this litigation, and requested the names of residents who might be interested in participating in interviews for the story. Mr. Wagner was contacted by the FHC in order to ascertain whether or not he would be interesting in participating in the story. Mr. Wagner said that he would. This information was passed along to the reporter, but the FHC

has heard nothing further about this story to date.

4) Wallace deWitt, 8128 St. Andrews Village Drive

Method of Communication 1: Telephone

Date of Communication 1: May 4, 2001

Substance of Communication 1: Explained the modifications he had noted in his survey response. Explained that the purpose of modifying his unit was to accommodate his sister's visits; she had recently had a stroke. Discussed members of the board at St. Andrews.

Method of Communication 2: Telephone

Date of Communication 2: May 7, 2001

Substance of Communication 2: Discussed his candidacy in upcoming election.

5) Rebecca Breit, 3521 St. Andrews Village Circle

Method of Communication: Telephone

Date of Communication: October 2, 2001

Substance of Communication: Paid $225 for lever hardware, and explained that she had tried from day one to get corrections to her home made. Also complained about shingles and a mosquito problems.

6) Mary Cannel McMahon, 3525 St. Andrews Village Circle

Method of Communication: Telephone

Date of Communication: Unknown

Substance of Communication: Explained that she had spent $100 on bathroom modifications, for which she would like to be reimbursed. She is in a wheelchair, and does not have lever hardware.

7) Charles and Phyllis Carlson, 8116 St. Andrews Village Drive

Method of Communication: Telephone

Date of Communication: Unknown

Substance of Communication: Paid $200 for bathroom modifications.

8) Saundra Uhde, 3542 St. Andrews Village Circle

Method of Communication: Ms. Uhde contacted the FHC by telephone.

Date of Communication: October 3, 2001

Substance of Communication: Ms. Uhde explained that she was the second owner of this unit, having moved in September 2000, and that her mother was in a wheelchair. Ms. Uhde had to install two ramps at her own expense, one to the sunroom and the other to the garage. She also had to remove the cellar door and master bath door to give her mother more room to maneuver her wheelchair. She received our number from Richard Wagner. She did receive our survey in the mail but did not respond to

it. Said that she may be willing to be interviewed for the Courier Journal story mentioned above. This information was passed along to the reporter, but the FHC has heard nothing further about this story to date.

9) Mr. And Mrs. Robert N. Krapster, 3537 St. Andrews Village Circle

Method of Communication: Telephoned the FHC

Date of Communication: October 15, 2001

Substance of Communication: The Krapsters bought their unit when it was one year old. The unit had lever hardware, but they did not have it installed. Identified modifications they had made to their unit, most of which were unrelated to accessibility.

Greenhurst

1) Richard Eisert, 3902 Village Green Dr.

Method of Communication 1: Meeting

Date of Communication 1: February 2, 2001

Substance of Communication 1: Mr. Eisert detailed the modifications that he requested and received from the builders, including interior structural changes to bedroom #2, closet space changes, bathroom

modifications, kitchen modifications, garage ramp, elimination of step into veranda, elimination of step at front door, raising/lowering of environmental controls, installation of lever hardware, widening of doors, and modifications to garage door. He had discussed these modifications with Gary Williams, a friend of Mr. Eisert's and an architect for WKB. Discussed the modifications he paid for, and what amount he paid. Discussed modifications paid for by developers. Identified some neighbors that may have made modifications. Received survey sent out by Defendants' counsel, and noted that he understood that every owner received the survey. Spoke with a few neighbors about the survey, but did not know if they had responded.

Method of Communication 2: Telephone

Date of Communication 2: February 12, 2001

Substance of Communication 2: He had contract to purchase a unit before building was completed; agreement was inked many times before settled. WKB knew that he was not in a hurry, until December of 1996, when suddenly wanted to close. Closed in December of 1996. Gave location of development and his

unit. Mr. Eisert explained that the glass-enclosed veranda section of the early structures sun-porch was not usable. He had his front door enlarged and his front area raised so that it was level to eliminate the step. He also had the veranda raised. He dealt with Gary Williams, who was very helpful.

2) Emil and Vela Herman, 3937 Village Green Dr.

Method of Communication: Telephone

Date of Communication: May 8, 2001

Substance of Communication: Discussed modifications to garage, bathrooms, and ramps that they added.

3) George and Doris Moore, 3847 Greenhurst Dr.

Method of Communication 1: Telephone

Date of Communication 1: May 8, 2001

Substance of Communication 1: Discussed ramps added to unit (one concrete and two wooden), bathroom modifications made, and grab bar installed in hall. Expressed desire to have wider doors in unit for easier passage.

Method of Communication 2: Telephone

Date of Communication 2: Unknown, after September 1, 2001

Substance of Communication 2: Informed FHC that her husband had passed

away, and that she does not expect to receive reimbursement.

4) Eleanor Thomas; 3932 Greenhurst Dr.

Method of Communication: Telephone

Date of Communication: On or about May 8, 2001.

Substance of Communication: Detailed modifications made to her patio, shower, sink, commode and doors, and the costs of each modification made.

5) Stan F. Lipton, 495-0931

Method of Communication: Telephone

Date of Communication: February 12, 2001 Substance of Communication: Mr. Lipton was is a nursing home. Said he owned a unit at Greenhurst, but did not understand the question being put to him about modifications there.

6) Gene Carta, 3932 Village Green Drive

Method of Communication 1: Telephone

Date of Communication 1: May 8, 2001

Substance of Communication 1: Provided FHC with three names of possibly disabled tenants.

Method of Communication 2: Telephone

Date of Communication 2: September 17, 2001

Substance of Communication 2: Discussed Troon at Landis Lakes. Also discussed various modifications made to his own unit.

Interrogatory No. 16: State the name, address and telephone number of all persons likely to have discoverable information relevant to matters disputed in this action, and the nature of the information for each person identified.

Response: See Responses to Interrogatory No. 1, Interrogatory No. 7, Interrogatory No. 8, Interrogatory No. 14, and Interrogatory No. 15,

REQUESTS FOR PRODUCTION OF DOCUMENTS

Request No. 1: The complete files relating to the Defendants not heretofore provided, including but not limited to all documentation of alleged violations of the law committed by the Defendants.

Response: Refer to collated documents identified as Attachment No. 1, Bates Stamp Nos. 000000-000277.

Request No. 2: All documents not heretofore produced which you intend to introduce into evidence at trial or may be used to refresh the recollections of witnesses at depositions or at trial.

Response: Plaintiffs have not yet determined what documents may be introduced into evidence at trial or may be used to refresh the recollections of witnesses at depositions or at trial. When the Plaintiffs have reached a decision regarding these documents, we will supplement the record accordingly.

Response No. 3: All documents supporting your contention that the Defendants' alleged violations of the Fair Housing Act have resulted in impairment of your organization's ability to carry out its mission.

Response: Refer to collated documents identified as Attachment No. 2, Bates Stamp Nos. 000278-000733, and Attachment No. 6, Bates Stamp Nos. 001002-001029.

Request No. 4: All documents demonstrating any efforts to encourage nondiscriminatory housing practices through education, including, but not limited to, any attempt to educate any of the Defendants about the Fair Housing Act's requirements.

Response: Refer to collated documents identified as Attachment No. 2, Bates Stamp Nos. 000278-000733, and Attachment No. 6, Bates Stamp Nos. 001002-001029.

Request No. 5: All documents regarding funding from the Department of Housing and Urban Development or other sources for the purpose of enforcing or ensuring compliance with laws intended to provide access to housing by bringing suit against parties such as the Defendants.

Response: Refer to collated documents identified as Attachment No. 3, Bates Stamp Nos. 000734-000885.

Request No. 6: All documents regarding funding from the Department of Housing and Urban Development or other sources for the purposes set forth in your mission statement in the Complaint in this action.

Response: Refer to collated documents identified as Attachment No. 4, Bates Stamp Nos. 000886-000988.

Respectfully Submitted,

\s\ C. Alex E. Rose

C. Alex E. Rose
Thomas A. Ebendorf
Galen Martin
FAIR HOUSING COUNCIL
835 West Jefferson Street, Suite 100
Louisville, KY 40202
(502) 583-3247
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing was served via hand-delivery, on this the 30th day of January, 2002 upon the following: William J. Walsh, Tilford, Dobbins, Alexander, Buckaway & Black, LLP, 1400 One Riverfront Plaza, Louisville, KY 40202; Thomas A. Ebendorf Barber, Banaszynski & Associates, 100 North Sixth Street, Fifth Floor, Louisville, Kentucky 40202.

\s\ C. Alex E. Rose
C. Alex E. Rose

APPENDIX I

DEPOSITION OF ANTHONY BAIZE

* * *

runner. But those were just things we did to help to pitch in.

Q. Are you aware of when the Fair Housing Council first became aware of WKB?

A. Best of my recollection, the Fair Housing Council became aware of WKB after our test coordinator scouted the Olde St. Andrews location.

Q. Is that Nick Valenzuela?

A. That's correct.

Q. And when was that?

A. I believe that was in the middle of 1998, either June or July.

Q. I'm going to show you what we're going to mark as Defendants' Exhibit 1, which are documents Bates Stamp Numbers 989 through 1001 in Plaintiffs' Production to Defendant of Documents.

[WHEREUPON, document referred to is marked Defendants' Exhibit 1 for identification.]

BY MR. WALSH:

Q. It's a list of diversion -- for diversion-of-resources purposes of activities of the Fair Housing Council, and I believe it provides dates -- does it not? -- of when the Fair Housing Council did things in this case.

A. It does, yes.
Q. Can you take a look at this and tell me if July 22nd, 1998, the first date referencing Nick Valenzuela's name, the first reference on the sheet, is probably the first date that the Fair Housing council became aware of WKB?
A. To the best of my knowledge, yes. I will say that, probably at this time, we weren't aware that WKB was the developer of Olde St. Andrews, but soon after that, we became aware of that.
Q. Was there anything about the Village of Olde St. Andrews that distinguished it from other developments in Jefferson County when you first encountered it?
A. Well, the one thing that was dist -- distinguishable about it from my recollection, is the fact that it appeared to be covered multi-family housing, and there appeared to be large steps at each entrance.
Q. Okay. So, it was the steps that first caught your attention; is that correct?
A. That would be my belief, yes.
Q. It would -- if that would be your belief, is that based upon talking to Mr. Valenzuela, or what you saw, or what?

A. That I can't recall. I mean, I -- I have seen -- since the lawsuit's been filed, I have seen these units, and that would be -- that would be my belief of why Mr. Valenzuela targeted this site for testing.

Q. Did the Center for Accessible Living have any role at this point?

A. At this point, no, I don't believe so.

Q. When did they first have a -- take up a role in this case?

A. I believe that is probably when Mr. Valenzuela contacted the Center to see if they could help us recruit disabled testers to survey the sites.

Q. Would that be August 17th, 1998, if you will look on Bates-stamped Page 990?

A. That is probably right.

Q. Could you describe what their role was thereafter?

A. To the best of my knowledge, the Center helped the Fair Housing Council find and locate persons who would be willing to volunteer to be testers. These included folks who were in wheelchairs and had other disabilities.

Q. And when did they -- when did the testing

of this location, St. Andrews, end?
A. That's a good question. I would have to look through the record to find out.
Q. Would it be September 1st, 1998, if you'll look at Page 9 -- at Bates Stamp 991?
A. I believe that's probably right, although there is a note on October 5th that Mr. Valenzuela drove out and viewed the Village of Olde St. Andrews. I'm not sure if he did the actual survey on that date or not.
Q. Mr. Valenzuela works for the Fair Housing Council; correct?
A. At the time, he did, yes.
Q. What role did the Center for Accessible Living have after the debriefing of testers on September 1st, 1998, in this case?
A. We had been in contact with them concerning litigation. We did discuss with them -- I know our former staff attorney, Kevin Kijewski, did have meetings with him and discuss with him the filing of the lawsuit.
I guess, could you be more specific; what are you looking for?
Q. What, if anything, have they done since that day, as an organization, that has to do with

* * *

A. Yes. Without going into too much detail, there is a development in eastern Jefferson County where the only violation we noted was that there were no lever handles on the doors. Everything else was accessible.

Q. Where is that, exactly?

A. That is, I believe, a development called Champion Farms at Springhurst.

Q. Okay. And when was that built; do you know?

A. I do not know exactly; I believe in either late 1999 or early 2000.

Q. Are you aware of any developments where there are worse violations than the Village of Olde St. Andrews?

A. No.

Q. How many different developments has the Fair Housing Council looked at in Jefferson County, if you know?

A. Approximately -- I'd say approximately 30 within Jefferson County.

Q. Okay. And that is in what -- in what period was that investigative work done?

A. Between 1997 and the present.

Q. So you began looking to find

developments that had violations of the Fair Housing Act in 1997; is that correct?

A. I would believe so, yes. I'm -- I -- well, let me take that back. We probably began looking before; I don't know if we ever discovered any before.

Q. Had you discovered any prior to discovering the Village of Olde St. Andrews?

A. To the best of my recollection, no.

Q. Have you discovered any, since, where you filed lawsuits?

A. Lawsuits, no; we have filed a complaint against a -- a complex with the Department of Housing and Urban Development.

Q. Do you know what that complex is?

A. Yes, that complex is Autumn Ridge, and it's in Jeffersonville, Indiana.

Q. And what are the violations at Autumn Ridge, to your knowledge?

A. There are steps at the front doors, thermostats are too high, electrical outlets are too low, and, I believe that's the extent -- or -- and there are [sic] not lever hardware on the doors; they have knobs.

Q. And where have you filed the complaint,

again; I'm sorry?
A. U -- with the United States Department of Housing and Urban Development.
Q. And when was that filed?
A. That complaint was filed last year. I'm -- mid to late last year; I don't know the exact date.
Q. Are there any other such cases?
A. At the current time, I'm not aware of any.
Q. You told me that the Fair Housing Council began seeking to identify builders who had violated the Fair Housing Act in about 1997, maybe somewhat before. Can you tell me why the Fair Housing council undertook to do that?
A. We began hearing about cases around the country where builders were not complying with the accessibility requirements. Nearly 10 years after the amendments to the Fair Housing Act were passed, builders were still building multi-family housing that was inaccessible. And we began to hear from our colleagues around the country that -- we -- this needed to be something that we needed to make a priority, as well as our other investigations.
Q. Did you get that information through the Advocate?

A. Well, we put the Advocate together, so -- I mean, some of the information, I'm sure, we -- we saw from the Advocate. Other, we go to national meetings and discuss cases with fair-housing professionals all the time, so . . . I'm sure some of the information received came from the Advocate; some came from discussions at meetings; some came from people calling us and letting us know about their cases.

Q. Did you receive grant money for this purpose? Or funding?

A. Yes, we did.

Q. And was that the enforcement grant that the Fair Housing Council received?

A. Correct.

Q. And could you be specific about which enforcement grant? I do have the information here, but if you have ready reference to which grant we're talking about, I'd like you to say that now.

A. I believe the grant you're speaking of began in December of 1997; it was a two-year grant.

Q. Okay. What was -- what method did the Fair Housing Council decide to use to find builders who were in violation of the Fair Housing Act?

A. As with our other investigations, we decided to use testing. We developed a specific testing methodology to use to locate violations of the accessibility requirements. Essentially, an accessibility survey that we developed requires a tester to go to a site, and basically, eyeball the property to -- to look for violations. If they find violations, we sometimes, though not always, run a second test to see if there are additional violations that the first tester missed.

Q. How do you choose the sites to go look at?

A. Essentially, we go for any new multi-family housing that we see going up.

Q. Is this what you -- whatever you happen to see out there in Jefferson County?

A. Right, I mean, if -- if we -- if we know that there is a new apartment complex being built, or a new condo complex that is covered in multi-family housing, we will usually survey that property.

Q. Do you make use of public records in finding out where there have been new developments?

A. I'm sure we do, but I do not recall doing

that in this case.
Q. Why are you sure that you do that?
A. Because I -- I know myself, I've looked in the newspaper and said, "Oh, there's a new apartment complex going up. We should do a -- we should do a survey on that site." If by "newspapers" you mean public records, yes. If you mean by going to Planning and Zoning, or going to Code Enforcement, and saying, "Hey, what's been filed recently?" I don't recall us doing that.
Q. Okay. So, newspapers.
A. Sure.
Q. Anything else?
A. Apartment guides that say, "New construction," "Come to the newest places in Jefferson County," et cetera.
Q. Is -- how is finding builders in violation of the Fair Housing Act a part of the Fair Housing Council mission?
A. Well, our mission is to eradicate discrimination in housing. And when a house is built inaccessibly, it discriminates against persons with disabilities. And, therefore, it impairs our mission to eradicate that type of discrimination.
Q. What -- how big of a part of your mission

is this -- is the work that you do identifying builders who've violated the Fair Housing Act?

A. Builders as far as inaccessibility, or builders who may discriminate on other -- for other reasons?

Q. Well, bo -- first of all, let's look at discrimination in total.

A. Discrimination in total: I mean, that -- that is -- you know, that is -- that is our main mission, I would say. I mean, it's our job to eradicate discrimination if we find builders or owners or managers or other housing providers that are discriminating on any basis. We -- we seek to end that.

Q. What's the main method you use to end discrimination?

A. We do investigations, we do testing, and then when we find credible evidence of discrimination, we file lawsuits or we file complaints with the Department of Housing and Urban Development.

Q. So, advocacy and/or litigation would be the main way you do that; is that right?

A. Yes.

Q. Okay. And are there any other ways that

you seek to eradicate discrimination?
A. Yes. We -- we do seek to educate the public. We have published the National Fair Housing Advocate for more than 10 years now. It's a free publication, available to anybody who requests it. We have thousands of real-estate professionals on our lists, including home builders and others. We also speak at meetings around town and around the state and throughout the region, trying to educate people on the Fair Housing Act.
Q. Is it fair to say that educational work is a secondary approach for the Fair Housing Council in its work to eradicate -- in its work eradicating discrimination?
A. I wouldn't say that, necessarily. I'd say that education and enforcement are equally important to us.
Q. What do you do more of?
A. Well, I -- I'd say right now, we -- it's about 50 percent. I mean, we have one education grant right now; we have on enforcement grant right now.
Q. As of the time that you filed this lawsuit, what did you do more of? 1998.

A. 1998? Again, we had one enforcement grant, one education grant. We spent about 50 percent of the agency's time working on our education activities; about 50 percent of the time working on enforcement.

Q. Now, you had that two-year grant from HUD starting in December of 1997, which I believe was an enforcement grant; correct?

A. M-hm. Right.

Q. Did you receive an equal or similar amount of money for educational purposes from HUD?

A. We received a smaller amount of money for educational purposes during that time period.

Q. Doesn't that lead -- wouldn't that lead the organization to spend more work on -- more time and work on enforcement if they're getting more money to do that?

A. I don't think so. You know, the -- the reason for the more money is that more people are employed by that particular grant. Under our education grant, one, possibly two, people were paid, whereas under the enforcement everyone else on the staff was paid.

Q. And how big was the staff in 1998?

A. 1998, I believe we were a staff of five.
Q. A staff of five. So, you had three people paid for under the enforcement grant and two under the education grant; is that correct?
A. I think so, yes.
Q. But there was -- they did work interchangeably; there was no distinction in the work they did, whether or not their position was funded for education or enforcement purposes; is that also correct?
A. Can you rephrase that question?
Q. Does -- did it -- did the work that individual staffers at the Fair Housing Council did depend upon whether their position was funded through the education grant or the enforcement grant?
A. I'm going to say -- I'll say "yes," because the test coordinator was funded under the enforcement grant, and he spent most or all of his time doing enforcement work, whereas I, during that time period, was the publication specialist; I was funded by the education grant, and I spent most or all of my time doing education work.
Q. And Mr. Kijewski was funded by -- under the enforcement grant as well; correct?

A. Correct.
Q. Who else was funded -- what other positions were funded under the education grant in 1998, other than your own?
A. To the best of my recollection, part of Mr. Martin's salary was funded under the education grant, and part of his salary was funded under the enforcement grant.
Q. How big of a part under the education grant?
A. I can't recall right now, but I -- as much as -- as much as half, no more than half under education; no more than half under enforcement.
Q. You believe it was about half?
A. To the best of my recollection, yes.
Q. Part of your mission is the encouragement of nondiscriminatory housing practices; is that correct?
A. Correct.
Q. And you do that both through education and enforcement; is that also correct?
A. Correct.
Q. Is there any other way that you encourage nondiscriminatory housing practices, other than education and enforcement?

A. We do maintain membership in the Fair Housing coalition, which is a -- a broader coalition of group around town that includes bankers, builders, nonprofit groups. We attend those meetings, we discuss what we feel the issues are in fair housing right now, what needs to be watched for and avoided, what needs -- you know, what the big issues are. We do try to monitor the city's Analysis of Impediments to Fair Housing Choice, which is a document that the U.S. Department of Housing and Urban Development requires them to do. We try to make -- we give suggestions for that document, so that the government understands what fair housing is in Louisville and Jefferson County.

Q. And that work -- attending meetings, monitoring what the city does, providing suggestions -- does not fall under the rubric of educational work?

A. Well, I'd -- I'd sure, you know, sure it does. Yeah.

Q. It does?

A. Yeah.

Q. Okay. So everything that you do to encourage nondiscriminatory housing practices is

either education or enforcement; is that fair?
A. Yes.
Q. Could you give me a definition or description of the educational work that you do?
A. Yes. we publish the National Fair Housing Advocate; again, a free publication available to everyone, nationwide. We publish reports on segregation in public schools. We publish reports on segregation in housing, residential housing. We've published -- we have published reports in the past on the gap between white teachers and African-American teachers in Kentucky's public schools. We have published additional reports on other topics, mostly relating to desegregation and fair housing. We hold press conferences to announce cases, to announce the filing of cases, to announce the settlement of cases.
And, again, we attend the meetings. We give seminars and training to housing providers to let them know what fair housing is and what the requirements are of them under the Fair Housing Act.
Q. That's basically a description of the work you do that's education. Can you give me a

definition that distinguishes it from enforcement?
A. Yes. Enforcement involves testing and the filing of complaints and lawsuits.
Q. So, litigation advocacy; is that correct? Basically, investigation leading to litigation and/or other forms of advocacy?
A. Right.
Q. Okay. And everything else would be educational; trying to tell people what the rules are, trying to -- and what the problems are; right?
A. Right. I mean, you know, it's our goal to educate not only the victims of the possi -- potential victims of discrimination what their rights are, but also people in the real-estate indry what -- real-estate industry what their requirements are under the Act.
Q. Does this lawsuit count as enforcement?
A. Yes.
Q. It's encouragement of nondiscriminatory housing practices through enforcement of the law; correct?
A. Correct.
Q. And that's the pri -- and most of the funding that your organization was getting in 1998 was for that purpose: enforcement of the laws in

order encourage nondiscriminatory housing practices; is that right?

A. Most of the funding, yes.

Okay. seventy percent, in 1998, I [illegible] is that right?

A. [illegible]lieve that figure is correct.

Q. After you determined that WKB and the Defendants were violating the Fair Housing Act, in your opinion, did you make any attempt to encourage them -- did you encourage them to undertake nondiscriminatory or less discriminatory housing practices by educating them about the Fair Housing Act?

A. To the best of my knowledge, no. And that's probably because Springhurst and St. Andrews had already been completed. No matter if we had educated them at that point, it wouldn't have changed the steps at the front doors.

Q. Why did you believe it was necessary to file a lawsuit as opposed to just approaching them and telling them that their development was in violation of the law?

A. In the past, based on our knowledge and knowledge of other groups around the country that we've come into contact with at national meetings

and through doing the Advocate, it's been our understanding that housing providers may be good folks, but if you ask them no to do something and you don't have any way to back that up, they typically don't do it [sic].

Q. So suing them works best?

A. Yes.

Q. Even without talking about -- talking to them about it beforehand to see what they might be willing to do?

A. Again, the -- the developments at Greenhurst and St. Andrews were already built. We felt that talking to them about the Fair Housing Act at that point would not have changed that.

[WHEREUPON, counsel confer inaudibly.]

BY MR. WALSH:

Q. Have the ac-- have the actions of the Defendants in building these developments injured the Fair Housing Council?

A. Yes.

Q. How?

A. By frustrating our mission and by causing us to divert resources from other projects to this investigation and litigation.

Q. What is -- can you put a monetary value

on how much you've been injured?
A. I don't know that I can. I know that we have done some estimates in order to try to get a Settlement Agreement worked out with the Defendants. to the best of my recollection, the monetary figure we came up with the last time we put together an estimate was around $60,000.
Q. And how did you arrive at that figure?
A. The time spent by staff members on the case; the outside consultants we brought in on the case; the materials that we used involved in the case, the testing fees; just anything that -- anything that -- any money we spent on the investigation or litigation.
Q. You also asked for attorney's fees, so I'm assuming that that's not included in that figure.
A. That may be included; I -- I can't recall right now.
Q. Okay. So, attorney's fees might be included.
A. Yeah, that -- and probably are.
Q. So, the amount of the damages would be determined by looking at the cost of the lawsuit; is that basically right?
A. And the cost of the investigation prior to

the lawsuit, right.

Q. How have the actions of these Defendants, Ken Brown and WKB Associates, impaired the Fair Housing Council's ability to carry out its mission?

A. Well, as we stated, our mission is to eradicate discrimination in housing. And when a development like this is built in clear violation of the accessibility requirements of the Fair Housing Act, it says to the disabled people we serve that we haven't done our job and that these types of things are still happening, and that they cannot have access to this new house even though they should have access to it.

Q. So, the WKB Associates' and Ken Brown's actions have impaired your -- the mission of the Fair Housing Council, your organization, because they run counter to the Fair Housing Council's mission to -- of eradicating housing discrimination; is that right?

A. That's right. I mean, when disabled folks see this, they must wonder why, 10 years after the Fair Housing Act was passed, these kind of developments are still built.

Q. So, in other words, your mission has been frustrated because you haven't been able to

encourage nondiscriminatory housing practices because we built these developments; correct?

A. Correct.

Q. Are there any other ways, or is that basically a complete description of how you see frustration of mission?

A. Again, this is -- you know, the -- the buildings, as built, are ongoing violations of the Fair Housing Act, in our view. And until retrofits are made, until the defects in these buildings are corrected, we see them as an ongoing frustration to our mission to eradicate discrimination in housing.

Q. They run counter to that mission -- the developments themselves, as physical buildings, run counter to your mission; therefore, your mission is frustrated?

A. Yeah, the defects in the buildings and the -- the actions of the developers in not following the Fair Housing Act run counter to our mission.

Q. Do you believe that the Fair Housing Council has suffered a concrete, demonstrable injury in this case?

A. Yes.

Q. And that was what you described to me earlier in terms of the costs of this investigation

and litigation; correct?
A. Yes, as well as diverting other resources -- diverting resources away from other projects to focus on this investigation,.
Q. I'm going to come back to that in just a second. I want to talk to you again, thought. You gave me a rough description of what your concrete, demonstrable injury was. Is this something apart from your frustration of mission? You don't quantif -- put any monetary value on your frustration of the mission, do you?
A. Are you asking if that was included in the estimate --
Q. Right.
A. -- I gave to you? No, it was not.
Q. Okay. And do you put a monetary value on it?
A. We will seek damages based on frustration of mission if we prevail in this case, yes.
Q. Do you know how much?
A. No, I don't know how much.
Q. How would you determine how much?
A. Again, I don't know how we would determine that. I don't know if we would leave it

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presentations relating to housing for the disabled and/or the Fair Housing Act, tester training, and advice/referral services instead were spent in furtherance of this litigation."

Q. Do you know how much money was allocated for the National Fair Housing Advocate that was spend instead on this litigation?

A. I do not know that figure, no.

Q. Would you be able to determine that figure by looking at the records of you organization?

A. I believe so, yes.

Q. Okay. Do you have an idea of how much it would be? Whether it would be four figures or five figures or -- I mean, you said that you had a $60,000 figure total, so --

A. Right.

Q. -- I mean, what percentage?

A. The cost per issue -- if I recall correctly, the cost per issue of the Fair Housing Advocate is approximately $10,000. And during the course of this litigation, when we did not receive explicit HUD -- funding from HUD, we were not able to devote the Council's own separate funding to producing the Advocate and keep it going. We had

to stop publication of the Advocate, I believe, at the end of 1998, and we published an additional issue in '99, but did not publish in 2000 or 2001.

Q. I have the same question with reference to attending, speaking at seminars and/or presentations. Do you know how much money allocated for that was spent instead on this litigation and investigation?

A. Again, I don't know. It's -- it's more of a matter of us choosing not to do certain things in order to keep the litigation going. I mean, if we had chose to travel to a -- a conference in Jefferson County or outside of Jefferson County or in the region or outside the state, we probably would have chosen not to do that in order to keep this litigation going.

Q. So, because you were preoccupied with this case, you didn't do those things; is that correct?

A. Correct.

Q. And once again, with reference to tester training -- by the way, does that fall under education or enforcement, tester training?

A. That would be enforcement.

Q. That would be enforcement? Can you tell

me how much money allocated for that you believe was spent instead on this case?

A. Our typical tester training, depending on the number of testers who come, is typically around four to $500, maybe more.

Q. All right. And how many of those did you forego for the sake of this litigation?

A. I'd say one or two. We typically do one a year. And I -- I can't recall doing any in 1999 or 2000.

Q. And you didn't do that because the money wasn't available or you didn't have the time?

A. It's probably a combination of both. We didn't want to -- we didn't want to divert resources away from -- we didn't want to hinder the litigation by having tester trainings -- I don't know what I'm trying to say [laughs].

Q. Well, I mean, you know, my question is -- I mean --

A. It's probably a combination of both.

Q. Of both?

A. We wanted to make sure that we had funds available for this litigation because, at the end of 1999, we had no HUD funding, and we needed to do everything we could to stay open as an

organization.
Q. Okay. How about advice/referral services? How much money allocated for advice/referral services was spent instead on this litigation? Can you say, with any degree of accuracy?
A. I -- I can't say for sure.
Q. Okay. Well, are advice/referral services advocacy or education?
A. That's a -- that's a good question. I'd say advice probably would be education. Refer -- I -- that's a good question; I don't know -- I don't know how you could break that down.
Q. It's a -- is it a hybrid?
A. It could be a hybrid, yes.
Q. You believe that you could determine the amounts diverted, though; right?
A. I believe we could, yes.
Q. By looking at the cost of these educational and/or hybrid enforcement services and figuring out what you didn't do that you ordinarily would have done; right?
A. Right.
Q. When you say "ordinarily would have done," what time period are we looking at to

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with accessibility and getting the word out about accessibility in new constructions.

Q. And you would not have done that but for our actions?

A. Well, it's difficult to say. If you hadn't done it and someone else had, we probably would have done that, but I believe this was the first real violation we discovered of the accessibility requirements in Jefferson County.

Q. I'm trying to figure out . . . So, if somebody else in Jefferson County built a development that is similar to the developments that WKB built, with reference to the Fair Housing Act, you would have done the same thing; is that fair? And you found it?

A. Yes. That -- I -- I think -- I think that's fair. We -- whenever we find a violation of the Fair Housing Act, we have to work to counter that violation.

Q. Can you tell me -- can you put a value on the forming of a stronger partnership with the Center for Accessible Living? In other words, can you tell me what kind of impact that had on the Fair Housing Council's resources?

[WHEREUPON, counsel confer inaudibly.]

MR. WALSH: Right.

MR. EBENDORF: Is you question still on the table?

MR. WALSH: Well, yeah, it's still on the table. I -- I'll -- I'm going to have a follow-up question.

A. What impact did that have?

BY MR. WALSH:

Q. Yeah.

A. Well, when we formed a stronger partnership, we began to get more referrals from the Center. That did increase the number of complaints we received regarding not only accessibility, but other disability issues. Our partnership grant -- we did -- we did form a partnership with them and did apply for a grant and did receive a grant.

Q. You did receive it?

A. Right.

Q. How much was it?

A. It was for $600,000 over three years.

Q. Okay. And that -- did that grant -- when did you receive that $600,000 grant? I know the Resp -- it's in the interrogatories, but when did you get that?

A. That grant was finalized in December of 1999.
Q. And that's been --
A. No, excuse me. Excuse me. December of 2000.
Q. Has that not been your primary source of funding since then?
A. It has -- it has been a -- a large source of our funding; yes.
Q. More than half?
A. Yes, more than half.
Q. Close to -- could you give me a percentage?
A. I'm going to say 75 percent of new funding.
Q. Okay. Now, the --
[WHEREUPON, counsel confer inaudibly.]
MR. WALSH: Yeah.
BY MR. WALSH:
Q. Do you think you would have gotten that grant if you hadn't filed this lawsuit?
A. Probably, yes.
Q. Okay.
A. I don't -- I don't --
Q. Would you have formed a stronger

partnership with the Center for Accessible Living and applied for that grant if you hadn't filed this lawsuit?

A. That, I don't know. Probably not.

Q. But you still would have applied for a grant, right, from HUD?

A. Right. Right.

Q. The grant is from HUD; correct?

A. Correct.

Q. HUD is the only source of funding; is that right? Or the primary source of funding?

A. It is -- it is our primary source of funding, yes.

Q. And when you say "primary," can you tell me a percentage again?

A. HUD funding, I assume, is around – well, I won't assume. HUD funding, I believe, is around 90 percent of our total funding.

Q. Okay. How was the forming of a stronger partnership with the Center for Accessible Living calculated to address the injury that WKB Associates and Ken Brown allegedly caused?

A. I don't know if -- I don't know if we put a monetary -- I don't know if we could put a monetary figure on that. We could --

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Q. And does it not there say that, "The Kentucky Fair Housing Council has not published an issue of the National Fair Housing Advocate since November 1998, when it is learned that HUD did not award a FHIP grant to the Council to continue its popular education and outreach project."

A. Correct.

Q. Why doesn't it say anything there about the activities of WKB Associates and Ken Brown?

A. Well, I -- I don't know why it would.

Q. Well, if we were responsible for your no longer publishing the National Fair Housing Advocate, it seems to me that that says that you're not publishing it because you don't have funding anymore.

A. Well, I said that it was -- you were partially responsible.

Q. Okay.

A. The Defendant's partially responsible. And had we not been devoting so much time to this litigation in 1999 and 2000 --

Q. You would --

A. -- then we would have had a chance to use some of our reserve funds to publish issues of the Advocate. When -- because we had limited reserve

funds and we wanted to see this case through, and not merely drop it because the agency would be forced to close, we did not spend the money on the Advocate and instead chose to focus on this litigation.

Q. It says here that you submitted more than 20 funding proposals; correct?

A. Correct.

Q. And they were all denied; right?

A. They -- yeah, it was either they were -- they were either denied or the foundation that we submitted proposals to said that we weren't within their mission scope or that they did not have funding large enough to sustain the Advocate.

Q. But you believe that, due to the actions of the Defendants, you weren't able to use money that you had in the bank to continue to publish this National Fair Housing Advocate; correct?

A. I believe that's correct, yes.

Q. How many more -- how many issues would you have published with the money you had in the bank if you weren't being funded anymore?

A. I'm sorry; could you restate that?

Q. How many more issues of the National Fair Housing Advocate, this publication, would you have

published had it not been for this lawsuit? You said you didn't publish about 20: right?

A. Right.

Q. Do you believe that all 20 of them are due to the actions of my clients?

A. As -- it is difficult to say. I'd have -- I'd have to go back and see how much money we had at the time of the litigation to see how many issues we could have feasibly published with the money.

Q. But you definitely blame us for not publishing some of them?

A. Yes.

Q. What staff were cut other than Nick Valenzuela due to your failure to get funding here?

A. Funding for the Advocate?

Q. Right.

A. At the time, Mr. Valenzuela was the only person laid off.

Q. So you were without funding for education or outreach for how long?

A. From Nove -- I assume from November 1998 until our latest grant, which was finalized in March of 2002.

Q. You believe that WKB Associates and Ken Brown are responsible for that in any way?

A. Responsible for our grant applications not being approved?
Q. For not having funding for those activities, one way or the other?
A. Again, we could have focused other -- other resources that we had on education and outreach had we not been working on this case.
Q. So you would have used -- and what -- could you be more specific about what these other resources are?
A. Resources that we have, you know, in the bank. We have -- we have obtained settlements in other complaints, which we then use to fund our activities.
Q. How much money are we talking about?
A. That's a good question. Currently, I believe we have around $70,000 in reserves.
Q. All right. So, at that time, how much did you have?
A. At that time, it was substantially less, but I cannot recall the exact amount.
Q. When you say "substantially," do you mean half as much or three quarters as much or a quarter as much?
A. Maybe half as much, but I'm really not

sure.
Q. I want to redirect your attention to Page 5, where we have that, sort of, list of the items from which the Defendants have been diverted [sic]. The National Fair Housing Advocate, attending/speaking at seminars and presentations, tester training, and advice/referral services. What percentage of those activities did you no longer have funding for as of the date stated on Defendants' Exhibit 2, when you ran out of funding -- which I believe was November of 1998 -- for educational -- when you ran out of educational funding?
A. I'm sorry; the question was kind of long. Could you --
Q. All right. You're right. Of those activities that you've listed there as having --
[WHEREUPON, counsel confer inaudibly.]
BY MR. WALSH:
Q. -- had funds diverted due to the actions of the Defendants, how many of them would have been funded by these educational grants that you were no longer getting November of 1998? The National Fair Housing Advocate: that's one; right?
A. Correct.

Q. Attending and speaking at seminars and other presentations: that's two; correct?
A. Well, we -- you know, we do that when we only have an enforcement grant, so I -- I wouldn't say that --
Q. So that doesn't have any impact on it?
A. The fact that we didn't receive educational funding probably would not have prevented us from doing these types of things.
Q. So you would -- so that doesn't -- that's what I'm saying: the fact that you no longer had educational funding; it had an impact on the Advocate, maybe; right?
A. Right.
Q. You know, I don't know whether that had more or less of an impact that what my clients did, but you would agree that it had some; right?
A. Correct.
Q. The fact that you no longer had funding to publish this; right?
A. Correct.
Q. But you don't think that not having educational funding had an impact on your doing seminars and presentations; right?
A. Correct.

Q. And tester training?
A. Tester training; that's an enforcement issue.
Q. And advice/referral services?
A. Again, we -- we would -- we would do that now under enforcement or -- or education. I mean, as long as the office is open, we do advice and referral.
Q. So, only the actions of the Defendants had an effect on the fact that you didn't -- you may have done less, or you didn't do seminars and presentations, tester training, and advice/referral services; is that right?
A. Time spent on this -- time spent on this investigation and litigation; yes, it did lessen the number of those that we did.
Q. And -- whereas the fact that you were defunded didn't have any impact on that; right?
A. As far as the education funding going away, no, it did not have an impact.
[WHEREUPON, counsel confer inaudibly.]
BY MR. WALSH:
Q. Since the only thing that seems to have been impacted by the lack of education funding is the National Fair Housing Advocate -- it's the only

thing that you guys give up; right? And Nick Valenzuela.

A. Right. Again, you know, we do -- we did do other reports and -- and other local publications that -- that we did not do.

Q. So, there were other things that you didn't do; correct?

A. Correct.

Q. Well, are any of those things listed here?

A. Appar -- apparently not, but I do believe that there is a separate interrogatory talking about diversion or drain of resources.

Q. If you look at Page 7 of your Responses to our interrogatories, in Response to Interrogatory Number 3, look at -- if you could, read the last two paragraphs there into the record, please.

A. Under interrogatory Number 3?

Q. Right.

A. "Additionally, for the purposes of this litigation alone, the FHC was forced to retain outside counsel so that employees with responsibilities unrelated to this case could return to those responsibilities. Staff members including the Publications Specialist, Test Coordinator, and Assistant Director devoted a significant amount of

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would have been better stated if it had said: There -- the reason we could not conduct these education and outreach activities and cut our -- and the reason we need to cut our staff is because we did not have education funding and we were involved in litigation that was impairing our ability to do these things.

Q. Okay. So this -- so, you know, what I'm trying to understand here is, in fact, you know, not having education funding had an impact not just on the National Fair Housing Advocate, but also on other education and outreach activities, but those are not included in the activities that you've listed as having been impacted by the actions of the Defendants; is that right?

A. I don't think that's what I'm saying. I'm saying I think both had an impact; both the actions of the Defendants and the lack of education funding. Both had an impact on all these things.

Q. All right. With reference to, first of all, the National Fair Housing Advocate, would you ascribe the inability to publish the National Fair Housing Advocate more to the fact that you no longer had funding for that after November of 1998, or to the bad actions of the Defendants?

A. I would ascribe it to both, all right?
Q. I mean, could you say one was more than the other?
A. I'd say that we probably could not have done the full 19 issues that we missed of the Advocate without edu -- without additional education funding. It would have drained all of our resources.
Q. I do understand correctly that this litigation was paid for by your enforcement grant; right? Is that right?
A. For the most part, yes.
Q. And what -- to what extent is that not correct?
A. Well, the litigation has been ongoing since 1998; during the year 2000, the Fair Housing Council received no HUD funding at all.
Q. So, you had to use your reserves; correct?
A. Correct.
Q. And where do those reserved come from?
A. In those reserves are monies that we have in -- in bank accounts; they typically come from case settlements in other cases. We also have occasionally done contract work, testing contract work, for groups like the National Fair Housing

Alliance. We are working on a testing contract, separate from our HUD funds, with the City of Louisville. But, during the year 2000, those reserves were probably all from settlement funds that we have received prior to this litigation.

Q. Let me ask you something about that reserve. Is any of that money resid -- a residuary from the enforcement grant?

A. To the best of my knowledge, no.

Q. Okay. And you said you thought that reserve was about -- is about $70,000 now, and was less than that in the past; correct?

A. Correct.

Q. And you don't know how much you tapped into that for the sake of this lawsuit; is that also correct?

A. Again, we could put together a detailed accounting and -- for any money we've spent on this litigation when we did not have HUD funding. We could come up with a figure that --

Q. [interrupts] Right. But you don't know right now?

A. Off -- no, offhand, I don't know.

[WHEREUPON, counsel confer inaudibly.]

BY MR. WALSH:

Q. I want to try to better understand the distinction between enforcement and education funding when you received it from HUD.

A. Okay.

Q. I don't know whether or not we've got to go through these funding proposals or not to do that; I certainly hope not.

A. [laughs].

Q. Why weren't you able to use enforcement-grant money to continue publishing the National Fair Housing Advocate in November -- after November of 1998? Is there -- are you obliged not to spend enforcement money on this?

A. We are only allowed, by HUD rules, to spend five percent of an enforcement grant's budget on education and outreach. And, typically, that does not include large national publications like the Advocate.

Q. So the answer's "yes"; is that right?

A. Can you state the question again? I --

Q. Okay. I said: Are you obliged by the terms under which you receive an enforcement grant not to spend it on something like the National Fair Housing Advocate? That's a restatement of the question, but . . .

* * *

Q. Kentucky Fair Housing Council versus Albert Sienne, Sr. [phonetic], in the Southern District of Indiana, New Albany Division: what's the status of that? If you know.

A. that -- that -- I'm -- I honestly don't -- I don't recall working on that case. I think I remember the case, but I don't recall working on it, and I'm not sure of the status. I'm -- if I remember correctly, the Council may have received a default judgement in that case because the Defendants in that case did not respond, but -- that -- don't let me make assumption. I don't recall that -- the specifics of that case, and I don't think I worked on it.

Q. All right. How about Anthony Haines versus Yvonne Halterman, in the Southern District of Indiana?

A. I did work on that case, and that case was dismissed after the Plaintiffs in that case left town and no longer wished to pursue the case.

Q. Louisville and Jefferson County Human relations Commission versus Ulrich Kelletz [phonetic]; Jefferson Circuit Court; are you familiar with that case? It was filed in '98

A. Yes, that case was a case of sex

discrimination. I don't believe I worked very much on that case; I believe Mr. Valenzuela handled the investigation on that case. That case went to trial and was settled before the jury came back.

Q. Kentucky Commission on Human Rights versus Paul Worth [phonetic]; are you familiar with that case? Oldham Circuit Court.

A. Yes. That case I do remember working on. That case was a mobile-home-park case, where they did not want families with children living in the mobile-home park. That case settled, I believe, in 2000, after I had -- in 2000 -- yes, in 2000, after I had already left the Council.

Q. Okay. All other complaints filed by the Fair Housing Council have been administrative actions; correct? To the best of your recollection: is that correct?

A. To the best of my recollection, that's correct.

Q. And those would have been brought before either the Human Relations Commission or HUD?

A. Yes. When we file a complaint with HUD, typically, they refer those complaints to the local Commission or to the state Commission if there's not a local Commission in the particular locality

where the complaint's been filed.
Q. Do you do more of that than you do litigation in federal or state court?
A. We do more of that now, only because our current grant requires us to do so.
Q. Let me ask you about that current grant. You went a period of several years, correct, without receiving a large grant from HUD; is that correct?
A. I would say we did not receive funding from -- funding from HUD for all of 2000.
Q. For all of 2000?
A. Yes.
Q. So, one year?
A. For one year, and maybe a brief period at the end of 1999.
Q. What changed? Why have you been able to renew your funding?
A. It's difficult to say. The grants are competitive grants. Just -- our application may have been better one year than it was in prior years.
Q. Do they require -- and these are enforcement grants we're talking about correct?
A. We have -- we have received enforcement

and education grants --
Q. [interrupts] You've got a $600,000 enforcement grant and a $96,000 --
A. $96,000.
Q. -- education grant; correct?
A. Correct. Right.
Q. And under the terms of your present enforcement grant, how do those items vary from the one that was operative in 1997-'98 of which I have a copy, if you know?
A. The only terms I can think of specifically that are different between the two enforcement grants is that, between the enforcement grant that we operated under during '97-'98 and the one we received at the end of 2000, HUD put in a requirement that we file all complaints with HUD before filing them in court. That was not -- that is in the new grant, but was not in the old grant during '97/'98. And HUD now has a requirement where, if we recover funding -- excuse me -- if we recover damages in a case, we have to reimburse the government for the investigational expenses that we expend during a case.
Q. When one is applying for an enforcement grant, is an organization like the Fair Housing

Council better off having -- you know, being actively pursuing litigation such as this one?

A. I can't -- I would -- my guess would be "no," but I cannot say for certain about that.

Q. Why would that be your guess?

A. Because everybody who applies for these grants is involved in litigation.

Q. So if you weren't doing it, you would stand out?

A. [laughs]

Q. Is that right?

A. Well, I --

MR. EBENDORF: Don't answer if you don't know.

A. Well, again, I -- you'd have to ask HUD officials about how they rate the grants -- how they rate the applications.

BY MR. WALSH:

Q. After the $58,000 grant you had for publishing the National Fair Housing Advocate dried up in, I believe -- was it September or October of 1998? -- you only published one other Advocate between then and last month; correct?

A. Correct.

Q. And this lawsuit investigation has been

ongoing during that entire time; correct?
A. correct.
Q. And -- but you published again -- is it fair to say that you published again because you got new funding for publishing the Advocate?
A. It's fair to say that the publishing resumed when it did, but we had always planned on using some of our funds to resume publishing the Advocate, even if we did not receive new educational funding.
Q. Okay. So, in this case, it so happens that you started publishing again in July of 2002, and it so happens that you've got a new HUD grant for education that includes funding for the Advocate; correct?
A. Right. But --
Q. But you would have published it again whether or not you'd have gotten that funding?
A. We had plans to do so, yes.
Q. Would you have published it whether or not you completed this lawsuit? Resumed publishing, whether or not you had --
A. That's --
Q. -- completed this lawsuit?
A. That's difficult to say. I -- that's difficult

to say.
Q. So, it is still your contention that this lawsuit is more responsible for not publishing -- for the Fair Housing Council's being unable to publish the Advocate than the fact that you no longer had funding?
A. I -- I don't know if I'd categorize it as more responsible or not, but it's definitely partially responsible.
MR. WALSH: All right. That's all. Thank you.
THE WITNESS: Thank you.
MR. EBENDORF: Just a couple of follow-up questions, Joe.
CROSS EXAMINATION
BY MR. EBENDORF:
Q. Tony, in testimony regarding St. Andrews. I want to make sure that your response is as I recall it.
Was St. -- a the time that the tests were done at St. Andrews and the -- shortly prior to the filing of the lawsuit, was St. Andrews still in the -- in some portion of construction?
A. I believe it was, yes.
Q. There were some units that were fully

done, but there were still other parts that were not yet completed; is that correct?

A. That -- that is correct?

Q. Okay. Now, the Fair Housing Council's mission is to address discrimination in housing; is that correct?

A. Correct.

Q. The type of discrimination that the Fair Housing Council deals with; tell me what type of discrimination is of concern to the Commiss -- to the Council.

A. Right. The Fair Housing Act protects seven different classes of persons -- the Federal Fair Housing Act does. And those classes are race, color, national origin, religion, sex, family status, and disability.

Q. The -- disability is only one of seven protected groups under the Federal Fair Housing Act?

A. Under the Federal law, yes. Additionally, in Jefferson County, we have protection for sexual orientation and gender identity.

Q. Does the Fair Housing Council attempt to diminish its activity in -- in asserting the rights of one protected class against another?

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

FAIR HOUSING COUNCIL, INC., a Kentucky Non-profit Corporation, 835 West Jefferson Street, Suite 100, Louisville, Kentucky 40202, and

CENTER FOR ACCESSIBLE LIVING, INC., a Kentucky Non-profit Corporation, 981 East Third Street, Suite 102, Louisville, Kentucky 40203,

Plaintiffs,

v.

VILLAGE OF OLDE ST. ANDREWS, INC., 3500 St. Andrews Drive, Jefferson County, Kentucky 40241, 3503 St. Andrews Village Circle, Jefferson County, Kentucky 40241 and/or 10503 Timberwood Circle, Suite 210, Jefferson County, Kentucky 40223, Registered Agent: William F. Koch, Jr., 10503 Timberwood Circle, Suite 210, Louisville, Kentucky 40223, WKB ASSOCIATES, INC., 10503 Timberwood Circle, Suite 210, Jefferson County,

FILED
Jeffrey A. Apperson, Clerk
FEB 12 1999
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

Case No.: 3: '98 CV-630 H

Jury Demanded

Kentucky 40225, Registered Agent: William F. Koch, Jr., 10503 Timberwood Circle, Suite 210, Louisville, Kentucky 40223,

EPMARK, INC., an Ohio Corporation, Dublin, Ohio, Registered Agent: Edward A. Bacome, 6277 Riverside Drive, Dublin, Ohio 43017, Charter Number: 902372,

SABAK, WILSON & LINGO, INC., 315 West Market Street, Louisville, Kentucky 40202, Registered Agent: John D. Wilson, 315 West Market Street, Louisville, Kentucky 40202, and

KEN BROWN, ARCHITECT, 4223 Winchester Road, (Jefferson County) Louisville, Kentucky 40207

FIRST AMENDED COMPLAINT

COME NOW Plaintiffs, FAIR HOUSING COUNCIL, INC. and CENTER FOR ACCESSIBLE LIVING, INC., by and through counsel, Kevin J. Kijewski, and for their claims for relief against Defendants, VILLAGE OF OLDE ST. ANDREWS, INC., WKB ASSOCIATES, INC., EPMARK, INC., SABAK, WILSON, & LINGO, INC., and KEN BROWN, ARCHITECT, state as follows:

PRELIMINARY STATEMENT

This is an action for housing discrimination under the Fair Housing Act of 1968, as amended, 42 U.S.C. §§3601 et seq. ("Act"). Plaintiffs seek compensatory and punitive damages, declaratory judgment, and permanent injunctive relief caused to Plaintiffs by Defendants for violations of the Act based on handicap and disability in failing to design, construct, and own multifamily covered dwellings in compliance with the minimal accessibility requirements of the Act and for discriminating in the terms, conditions, and privileges of sale, and otherwise making unavailable dwellings to buyers because of a handicap of that buyer, a person residing in or intending to reside in that dwelling, and/or any person associated with that buyer.

JURISDICTION AND VENUE

1. This Court has jurisdiction of the federal claim pursuant to 42 U.S.C. § 3613(a) and 28 U.S.C. § 1331, 1343(a)(4), and 2201.

2. Venue of this action is appropriate in the United States District Court for the Western District of Kentucky at Louisville, pursuant to 28 U.S.C. § 1391(b) and (c) as the claim wholly arose in such district, the subject property are in such district and the Defendants conduct business in such district.

3. This case is brought properly in the Western District of this Court at Louisville pursuant to Local Rule 3.3 (1991).

THE PARTIES

4. Plaintiff Fair Housing Council, Inc. ("FHC"), is a Kentucky non-profit corporation whose mission and purposes include the investigation and eradication of housing discrimination, and the encouragement of nondiscriminatory housing practices through education,

outreach, and enforcement, including the elimination of discrimination against individuals with disabilities by ensuring compliance with laws intended to provide access to housing. The Fair Housing Act constitutes such a law.

5. Plaintiff, Center for Accessible Living, Inc. ("CAL"), is a Kentucky non-profit corporation whose mission is to assist in providing an environment that supports individuals with disabilities in attaining independent living and the right to choose his or her personal degree of independence. This includes, but is not limited to: Advocating for the expansion of the range of independent living options available to persons with disabilities; Educating service and housing providers, public officials, and the general public as to the needs of persons with disabilities; Administering programs to assist persons with disabilities in seeking and obtaining an independent lifestyle; and Advocating for the full exercise of the statutory and constitutional rights of persons with disabilities.

6. "The Village of Olde St. Andrews" is the commonly-known name for a condominium development located at 3500 St. Andrews Drive, Jefferson County, Kentucky near the intersection of Old Brownsboro Road and Standard Club Lane, and comprised of approximately 28 buildings containing four dwelling units or condominiums in each building amounting to approximately 112 condominiums or units (hereinafter "Olde St. Andrews"). A copy of a diagram of Olde St. Andrews contained in an advertising "Site Plan" is attached as Exhibit "A" and made a part hereof.

7. "Greenhurst Condominiums" is the commonly-known name for a condominium development located at and near 3940 Greenhurst Drive, Jefferson County, Kentucky near the intersection of Greenhurst and Hurstbourne Parkway and is similar in composition to Olde St. Andrews with buildings containing four dwelling

units or condominiums in each building (hereinafter "Greenhurst").

8. "The Village of Deer Creek" is the commonly-known name for a condominium development located at or near Taylorsville Road, 1/2 mile south of the "heart of Jeffersontown" and will be similar in composition to Olde St. Andrews and Greenhurst with buildings containing four dwelling units or condominiums in each building (hereinafter "Deer Creek").

9. Defendant, VILLAGE OF OLDE ST. ANDREWS, INC. ("Village"), is a Kentucky corporation which, upon information and belief, has designed, constructed, and/or owned and/or is in the process of designing, constructing, and/or owning Old St. Andrews, multifamily housing covered by the Act and other accessibility laws. Village's principal place of business is 3500 St. Andrews Drive, Jefferson County, Kentucky 40241, 3503 St. Andrews Village Circle, Jefferson County, Kentucky 40241, and/or 10503 Timberwood Circle, Suite 210, Jefferson County, Kentucky 40223. Village's registered agent for service of process is William F. Koch, Jr., 10503 Timberwood Circle, Suite 210, Louisville, Kentucky 40223.

10. Defendant, WKB ASSOCIATES, INC. ("WKB"), is a Kentucky corporation which, upon information and belief, is the developer and has designed, owned, and/or constructed and/or is in the process of designing, owning, and/or constructing Olde St. Andrews, Greenhurst, Deer Creek, and other presently unknown multifamily housing covered by the Act and other accessibility laws. WKB's principal place of business is 10503 Timberwood Circle, Suite 210, Jefferson County, Kentucky 40225. WKB's registered agent for service of process is William F. Koch, Jr., 10503 Timberwood Circle, Suite 210, Louisville, Kentucky 40223.

11. Defendant, EPMARK, INC. ("Epmark"), Charter Number: 902372, is an Ohio corporation which,

upon information and belief, is the designer and/or has designed, owned, and/or constructed and/or is in the process of designing, owning and/or constructing Olde St. Andrews, Greenhurst, Deer Creek, and-other presently unknown multifamily housing covered by the Act and other accessibility laws. Epmark's principal place of business is Dublin, Ohio. Epmark's registered agent for service of process is Edward A. Bacome, 6277 Riverside Drive, Dublin, Ohio 43017.

12. Upon information and belief, Epmark holds a U.S. Patent for the design of Olde St Andrews, Greenhurst, Deer Creek, and other presently unknown multifamily dwellings covered by the design and construction requirements of the Fair Housing Act,

13. Defendant, SABAK, WILSON, & LINGO, INC. ("Sabak"), is a Kentucky corporation which, upon information and belief, is the engineers, landscape architects and planners and has engineered, planned, designed, and/or constructed and/or is in the process of engineering, planning, designing, and/or constructing Olde St. Andrews, Greenhurst, Deer Creek, and other presently unknown multifamily housing covered by the Act and other accessibility laws. Sabak's principal place of business is 315 West Market Street, Louisville, Kentucky 40202. Sabak's registered agent for service of process is John D. Wilson, 315 West Market Street, Louisville; Kentucky 40202.

14. Defendant, KEN BROWN, ARCHITECT ("Brown"), upon information and belief, is the architect and has designed and/or constructed and/or is in the process of designing and/or constructing Olde St. Andrews, Greenhurst, Deer Creek, and other presently unknown multifamily housing covered by the Act and other accessibility laws. Brown's principal place of business is 4223 Winchester Road, Jefferson County, Kentucky 40207.

CAUSE OF ACTION

15. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 14 hereof, and incorporate the same herein by reference.

16. The Fair Housing Act at 42 U.S.C. § 3604(f)(1) prohibits persons and corporations from discriminating "in the sale ..., or otherwise make unavailable or deny, a dwelling to any buyer ... because of a handicap of ... that buyer ..., a person residing in or intending to reside in that dwelling ..., or any person associated with that buyer."

17. The Fair Housing Act at 42 U.S.C. § 3604(f)(2) prohibits persons and corporations from discriminating "in the terms, conditions, or privileges of sale ... of a dwelling ... because of a handicap of ... that buyer ..., a person residing in or intending to reside in that dwelling ..., or any person associated with that buyer."

18. Under the Fair Housing Act at 42 U.S.C. § 3604(f)(3)(C) the term "discrimination" includes, in connection with the design and construction of covered multifamily dwellings for first occupancy after March 13, 1991, a failure to design and construct those dwellings in such a manner that:

a. the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

b. all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

c. all premises within such dwellings contain the following features of adaptive design:

i. an accessible route into and through the dwelling;

ii. light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

iii. reinforcements in bathroom walls to allow later installation of grab bars; and

iv. usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

19. Pursuant to the Fair Housing Act at 42 U.S.C. § 3604(f)(7) the term "covered multifamily dwellings" is defined, in the case of buildings having no elevators, such as those found at Olde St. Andrews and Greenhurst and those to be found at Deer Creek, as "ground floor units in ... buildings consisting of 4 or more units." The buildings found at Olde St. Andrews and Greenhurst and those to be found at Deer Creek consist of 4 or more units and are covered under the Act.

20. Defendants' advertising brochures for Olde St. Andrews re-enforce that all the buildings at Olde St. Andrews, Greenhurst, and soon at Deer Creek are covered by the design and construction requirements of the Act, in that each building has a common roof and each building contains four ground floor dwelling units, by stating in the advertisement, a copy of which is attached hereto as Exhibit "B," the following:

a. "Exclusive pin wheel design combines only four residences into **each building**" (emphasis added);

b. "The architecture looks and feels like a large "single family" home from all four sides"; and

c. "The look, feel and privacy of a single home residence."

21. The Defendants' advertising brochures for Olde St. Andrews contain a rendition of one of the covered four dwelling unit buildings found at Olde St. Andrews, Greenhurst, and Deer Creek showing the common roof

and that all four dwellings are in one building. A copy of the rendition is attached hereto as Exhibit "C."

22. On information and belief, the buildings and units found at the Olde St. Andrews, Greenhurst, and Deer Creek were constructed for first occupancy after March 13, 1991.

23. Examples of discrimination under the Fair Housing Act at 42 U.S.C. § 3604(f) found at Olde St. Andrews, Greenhurst and to be found at Deer Creek include, but are not limited to:

a. Defendants' design and construction of covered units having no reserved accessible parking spaces for sales office or other areas;

b. Defendants' design and construction of covered units which are inaccessible from public/pedestrian arrival points;

c. Defendants' design and construction of covered units have an inaccessible route from the garage to the unit;

d. Defendants' design and construction of inaccessible routes to covered units which fail to use curb cuts or ramps and place steps or stairs in the route;

e. Defendants' design and construction of covered units having inaccessible door hardware, knobs are used instead of levers;

f. Defendants' design and construction of covered units having inaccessible exterior doors since the thresholds are higher than 3/4";

g. Defendants' design and construction of covered units with inaccessible light switches;

h. Defendants' design and construction of covered units with inaccessible electrical outlets, and;

i. Defendants' construction of covered units having inaccessible common and/or public use

areas, such as sidewalks, pool area, and club house.

24. Defendants have failed to comply with the Fair Housing Act's design and construction requirements by failing to design and construct covered multifamily housing to meet the minimal accessibility requirements of the Act. The Act requires that all covered multifamily dwellings must be designed and constructed so that the accessibility requirements listed above in paragraph 18 (a) through (c) are met. Defendants' have not complied.

25. Defendants failed to comply with the U.S. Department of Housing and Urban Development ("HUD") regulations implementing the Act, 24 C.F.R. §100.205, 54 Fed. Reg. 3232, 3289 (1989). These regulations are not mere recommendations, but are requirements for designers and constructors of multifamily dwellings covered by the Act to follow and aid in interpreting the Act.

26. Defendants failed to comply with the recommendations proposed by HUD in the Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472 (1991) and HUD's Supplement to Notice of Fair Housing Guidelines, 59 Fed. Reg. 33362-33368. The Defendants have failed to comply with the design and construction requirements of the Act and have failed to comply with the "safe-harbor" recommendations of the regulations.

27. The Defendants have wholly failed to design and construct multifamily dwellings covered by the Act in accordance with the accessibility requirements of the Act and have failed to comply or abide by all the regulations and guidelines pertaining to the design of such covered dwellings.

CHARGE OF DISCRIMINATION

28. The above listed facts detailing the acts and conduct of the Defendants are in violation of the Federal Fair Housing Act, as amended 1988, 42 U.S.C. §3604 et.

seq. and the Federal Fair Housing Regulations, in that, the above detailed facts constitute that the Defendants have and are discriminating against Plaintiffs on the basis of handicap and disability.

29. Defendants have and are intentionally and negligently discriminating against the Plaintiffs since they failed to design, construct, and own multifamily covered dwellings in compliance with the minimal accessibility requirements of the Act and since they discriminated in the terms, conditions, and privileges of sale, and otherwise made unavailable dwellings to buyers because of a handicap of that buyer, a person residing in or intending to reside in that dwelling, and/or any person associated with that buyer.

30. The complained of acts and conduct in paragraphs 1 through 29 demonstrate that the Defendants had a pattern and practice of discriminating against Plaintiffs and others based on handicap and on a failure to design and construct minimally accessible multifamily housing covered by the Fair Housing Act.

31. The complained of acts and conduct in paragraphs 1 through 29 demonstrate that the Defendants acted intentionally, maliciously, and negligently and that the Defendants are guilty of the willful and wanton disregard of the rights of the Plaintiffs.

32. As a proximate result of the unlawful discriminatory acts and conduct of Defendants in discriminating against persons with handicaps and failing to design and construct covered multifamily housing in compliance with the minimal accessibility requirements of the Act, regulations and other laws, Plaintiffs, Fair Housing Council and Center for Accessible Living, have been damaged, impaired, and frustrated in their efforts and missions to help provide housing, counseling, and assistance to home seekers, encourage open housing through educational programs

and outreach, and to eliminate discrimination in housing and to provide an environment that supports individuals with disabilities in attaining independent living and the right to choose his or her personal degree of independence, including, but not limited to:
Advocating for the expansion of the range of independent living options available to persons with disabilities; Educating service and housing providers, public officials, and the general public as to the needs of persons with disabilities; Administering programs to assist persons with disabilities in seeking and obtaining an independent lifestyle; and Advocating for the full exercise of the statutory and constitutional rights of persons with disabilities. Each and everyone of Plaintiffs' missions and efforts have been frustrated by Defendants' discriminatory acts and conduct.

33. Defendants' unlawful housing practices consisting of discriminatory treatment of Plaintiffs and others based upon handicap and disability and the discriminatory and inaccessible design, owning, and construction of multifamily dwellings covered by the Act have caused FHC and CAL to expend and continue to expend their scarce resources to identify and counteract this discrimination and to enforce the fair housing laws.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

a. Declare Defendants' failure to design and construct Olde St. Andrews, Greenhurst, Deer Creek, and other presently unknown multifamily housing covered by the Act in such a manner that it is readily accessible to and usable by individuals with handicaps and disabilities by complying with the requirements of the Fair Housing Act and regulations constitutes unlawful discrimination in violation of the Fair Housing Act and regulations, supra;

b. Permanently enjoin Defendants, their agents, employees and assigns from discrimination on the basis of handicap in violation of the Fair Housing Act and regulations;

c. Require Defendants to make all necessary modifications to all of the multifamily housing covered by the Act's design and construction requirements which is or was designed, owned and/or constructed by Defendants in order to eliminate all barriers that prevent access by persons with handicaps and to satisfy the standards and requirements of the Act and regulations;

d. Award Plaintiffs actual damages, including diversion of resources and frustration of mission, in an amount to be proved at trial;

e. Award Plaintiffs punitive damages;

f. Require Defendants to give notice and establish an escrow fund to pay for necessary modifications to any condominium at Olde St. Andrews, Greenhurst, Deer Creek, and other presently unknown multifamily dwellings covered by the Act's design and construction requirements where the owner of such

condominium desires that such unit be brought into compliance with the Fair Housing Act and regulations and, at the conclusion of such the term of the fund, for expenditures to improve accessibility and advocacy to the disabled in Kentucky according to such terms and conditions as are deemed appropriate by the Court;

g. Require Defendants to give notice and establish an escrow fund in an amount deemed appropriate by the Court for expenditures to bring all condominiums and other covered dwellings at Olde St. Andrews, Greenhurst, Deer Creek, and other presently unknown multifamily dwellings covered by the Act's design and construction requirements into compliance with the Fair Housing Act and regulations and, at the conclusion of the term of the fund, for expenditures to improve accessibility and advocacy to the disabled in Kentucky and elsewhere according to such terms and conditions as are deemed appropriate by the Court;

h. Require Defendants to design and construct the same number of "replacement units" as the number of units not brought into compliance with the Act and regulations at Olde St. Andrews, Greenhurst, Deer Creek, and other presently unknown multifamily dwellings covered by the Act's design and construction requirements whose features of accessible design are the same as those found in the Act and regulations. The replacement units will be single-family, detached dwellings, residences that would not otherwise be required to include the accessibility standards required by the Act and regulations;

i. Require Defendants to implement a compliance program designed to ensure that all

future covered multi-family dwellings designed, constructed, or owned by the Defendants (such as, upon information and belief, Deer Creek and other unidentified covered multi-family dwellings possibly near the new Southeast Christian Church on Blankenbaker Road), comply with the Act and regulations. Such program shall include certifications made to the Plaintiffs by the Defendants and architects familiar with the Act and regulations and such design and construction requirements contained therein that the design and construction comply with the Act and regulations;

j. Require Defendants to give notice and establish an escrow fund in an amount deemed appropriate by the Court for expenditures to pay the victims of discrimination who were precluded or discouraged from living at Olde St. Andrews, Greenhurst, Deer Creek, and other presently unknown multifamily dwellings covered by the Act's design and construction requirements since the design and construction failed to comply with the Act and regulations and, at the conclusion of such the term of the fund, for expenditures to improve accessibility and advocacy to the disabled in Kentucky and elsewhere according to such terms and conditions as are deemed appropriate by the Court;

k. Require Defendants to give notice and pay for necessary modifications to any condominium at Olde St. Andrews, Greenhurst, Deer Creek, and other presently unknown multifamily dwellings covered by the Act's design and construction requirements where the current or former owner of such condominium has already brought such unit into compliance with

the Fair Housing Act and regulations by making modifications at their own expense;

l. Require Defendants to provide all current and future employees, agents, and contractors involved in the design, construction, rental, or sale of multi-family dwellings covered by the Act the following:

i. a copy of any order, consent decree, judgment or other such entered into to resolve this matter;

ii. instructions on the terms of the order, judgment, or consent decree, the requirements of the Act and regulations, the requirements of the design and construction requirements of the Act and regulations, and the responsibilities and obligations under the Act and regulations of the Defendants and their employees, agents, and contractors;

m. Require Defendants to prominently display and post in all rental or sales offices of all covered, multi-family dwellings covered by the Act which the Defendants own or operate or acquired or developed a sign no smaller than ten by fourteen inches indicating that all dwellings are available for sale on a nondiscriminatory basis;

n. Require Defendants to prominently display and post in all rental or sales offices of all covered, multi-family dwellings covered by the Act which the Defendants own or operate or acquired or developed and are brought into or are in compliance with the design and construction requirements of the Act and regulations a sign no smaller than ten by fourteen inches indicating that all dwellings meet the accessibility features for persons with disabilities required by the federal Fair Housing Act;

o. Require Defendants, in all future advertising in newspapers, and on pamphlets, brochures, and other promotional literature regarding any covered, multi-family dwellings designed and constructed by the Defendants, to place, in a conspicuous location, a statement indicating that the dwelling residential units meet the accessibility features for persons with disabilities required by the federal Fair Housing Act;

p. Require Defendants to report to Plaintiffs their compliance with the relief obtained within sixty days of the entry of any order, judgment, consent decree or such and again every six months thereafter;

q. Award the Plaintiffs' attorney fees and costs pursuant to the Federal Fair Housing Act, 42 U.S.C. 3614(d)(2), and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988;

Such other relief in law and equity which this Court deems proper to make the Plaintiffs whole.

Respectfully submitted,

By: _____

\s\ Kevin J. Kijewski

Kevin J. Kijewski, Staff Attorney
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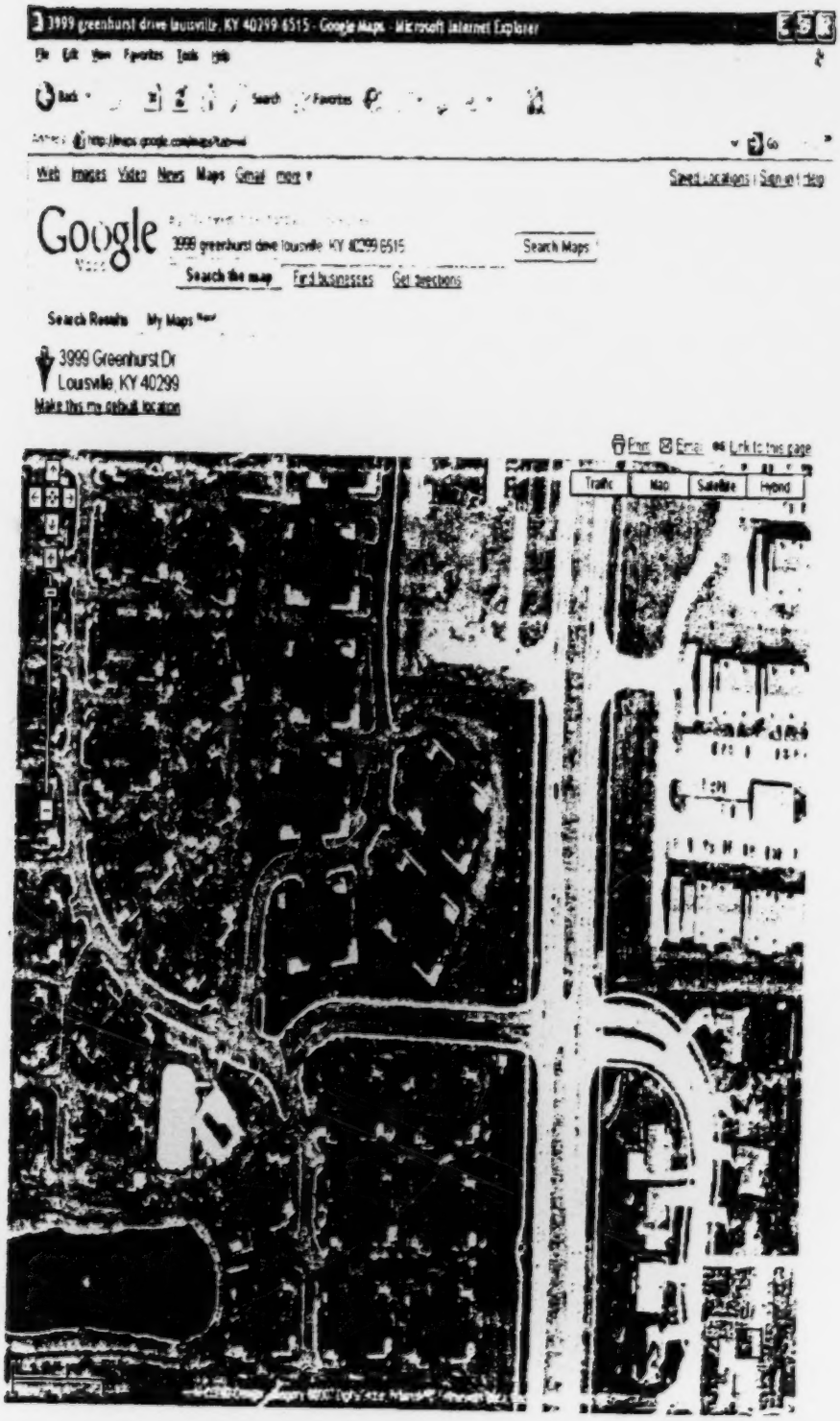
APPENDIX K



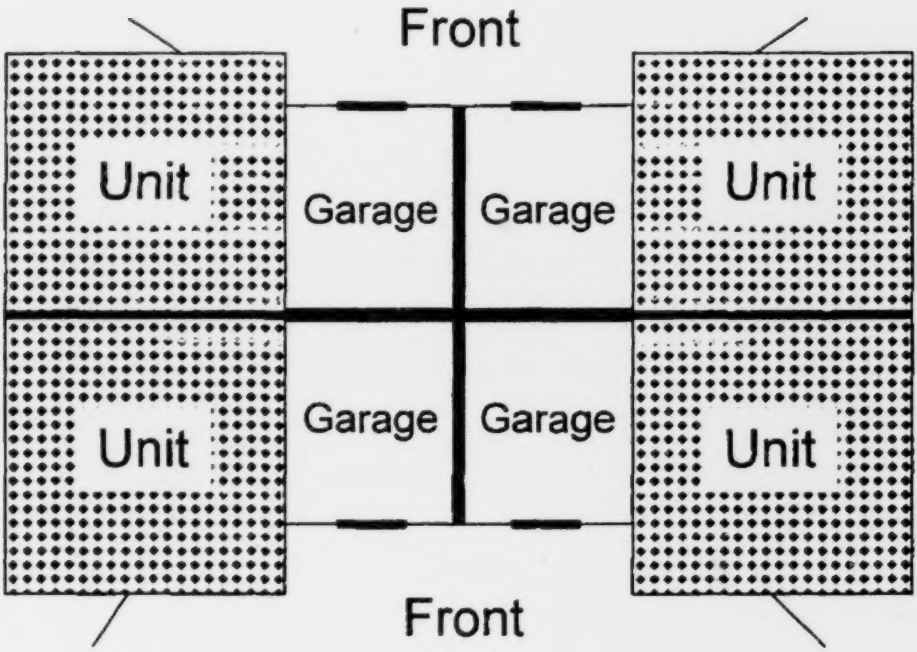


Illustration based on the written description of the units as provided in the District Court for the Western District of Kentucky's March 14, 2003 Memorandum Opinion. *Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*, No. 3:98-CV-630, slip op. at 3 (D. Ky. Mar. 13, 2003).

NOV 2 8 2007

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No. 07-421

IN THE

Supreme Court of the United States

VILLAGE OF OLDE ST. ANDREWS, INC.;
WKB ASSOCIATES, INC.,

Petitioners,

v.

FAIR HOUSING COUNCIL, INC.;
CENTER FOR ACCESSIBLE LIVING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* NATIONAL MULTI HOUSING COUNCIL, ZOM, INC., POST PROPERTIES, INC., LIONS GABLES RESIDENTIAL TRUST, INC., AVALONBAY COMMUNITIES, INC., CAMDEN PROPERTY TRUST, THE LESSARD ARCHITECTURAL GROUP, INC., WOOD PARTNERS, NILES BOLTON ASSOCIATES, INC., AND HUMPHREY & PARTNERS ARCHITECTS IN SUPPORT OF THE PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to this Court's Rule 37.2(b), the parties listed below respectfully request leave of this Court to file a brief *amicus curiae* in support of Petitioners the Village of Olde St. Andrews, Inc., and WKB Associates, Inc. Written consent for *amicus* participation in this case was granted by Petitioners. Written consent was withheld by counsel of record for Respondent.

Amici are the National Multi Housing Council, ZOM, Inc., Post Properties, Inc., Lions Gables Residential Trust, Inc., Avalon Bay Communities Inc., Camden Property Trust, The Lessard Architectural Group, Inc., Wood Partners, Niles Bolton Associates, Inc., and Humphrey & Partners Architects.

The interest of *Amici* is further set forth in the Interest of the *Amicus Curiae* section of the proposed brief at pages 1-5. This is a question of exceptional importance to *Amici's* members, who plan, design, construct, own, and manage multifamily properties across the United States. *Amici* have been subject to a torrent of litigation concerning whether the apartment communities they designed, built, own or manage comply with the Fair Housing Act's ("FHA") requirements that certain apartment units be constructed as accessible to persons with disabilities.

First, *Amici's* brief demonstrates that if the Sixth Circuit's interpretation of the requirements for standing remains in place, *Amici* will continue to be subject to litigation that is based on no more than the "testing" of properties by litigious advocacy groups. In effect, such litigation is merely the product of these groups' desires to advance a broad interpretation of the FHA's requirements while lacking actual injury. Advocacy groups' ability to avoid the typically rigorous requirements of standing

imposes costly and unwarranted obligations on multifamily designers and builders. *Amici* discuss two significant decisions issued since Petitioners filed their Petition.

Second, *Amici* want to bring to the Court's attention the impact that the lower courts' conflicting interpretations of the FHA's statute of limitations has on the multi-family community. *Amici* are concerned that without guidance from this Court conclusively rejecting the application of the "continuing violation doctrine" in FHA design and construction cases, those subject to the FHA by virtue of having designed or constructed a building subject to the FHA will have absolutely no protection from the statute of limitations. This is contrary to the plain language of the FHA and is exactly what Congress sought to avoid in enacting a statute of limitations that is triggered by the completion of design or construction.

This *amicus curiae* brief will assist this Court in determining whether to grant *certiorari*, and in ultimately resolving this case to prevent improper litigation under the FHA given the limits of fundamental principles of standing and the statute of limitations. *Amici* respectfully urge that the Court review the Sixth Circuit's opinion.

DATED: November 28, 2007.

TABLE OF CONTENTS

Page (s)

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. THE APPLICATION OF *HAVENS* TO FHA DESIGN AND CONSTRUCTION CASES MUST BE CLARIFIED 7

II. ORGANIZATIONAL STANDING CANNOT BE ESTABLISHED UNLESS THE ORGANIZATION DEMONSTRATES AN INJURY IN FACT INDEPENDENT OF RESOURCES DIVERTED TO LITIGATION RELATED COSTS 9

A. An Alleged Injury Based on the Costs of Litigation Alone is Insufficient to Confer Standing Upon an Organization 10

B. An Alleged Injury Based Solely on the Costs of Pre-Litigation Investigation and Testing is Equally Insufficient to Confer Standing 11

C. The *Havens* Holding Related to Organizational Standing Must Be Clarified 12

III. THE STATUTE OF LIMITATIONS FOR FHA DESIGN AND CONSTRUCTION VIOLATIONS IS TRIGGERED BY THE COMPLETION OF THE DESIGN AND CONSTRUCTION AND THE CONTINUING VIOLATION DOCTRINE IS INAPPLICABLE TO TOLL THE LIMITATIONS PERIOD 13

A. The Statute of Limitations is Triggered by the Completion of Design and Construction as Indicated by the Date of the Last Certificate of Occupancy. 13

B. Many Courts Inappropriately Rely on *Havens* as Grounds for Applying the Continuing Violation Doctrine to FHA Design and Construction Violation Claims 15

C. Applying the Continuing Violation Doctrine to FHA Design and Construction Violations Will Render the Statute of Limitations Meaningless 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page (s)

Cases

Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees, 19 F.3d 241 (5th Cir. 1994) 9, 10

Fair Employment Council of Greater Wash., Inc. v. BMC Mktg Corp., 28 F.3d 1268 (D.C. Cir. 1994) 10, 11

Fair Housing Council of Suburban Phila. v. Montgomery Newspapers, 141 F.3d 71 (3d Cir. 1998) 9

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. 528 U.S. 167 (2000) 10

Garcia v. Brockway, 503 F.3d 1092 (9th Cir. 2007) 14, 15, 17, 18

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) ..... *passim*

Hooker v. Weathers, 990 F.2d 913 (6th Cir. 1993) 9

Kuchmas v. Towson Univ., No. RDB 06-3281, 2007 WL 2694186 (D. Md. Sept. 10, 2007) 14, 16, 17

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 6, 10

Moseke v. Miller & Smith, Inc., 202 F. Supp. 2d 492 (E.D. Va. 2002) 12, 14, 16, 17

Nat'l Adver. Co. v. City of Raleigh,
947 F.2d 1158 (4th Cir. 1991) 17

Nat'l R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 18

Perez v. Laredo Junior College,
706 F.2d 731 (5th Cir. 1983) 17

Spann v. Colonial Vill., Inc.,
899 F.2d 24 (D.C. Cir. 1990) 9, 10

Thompson v. Mountain Peak Assocs., LLC,
No. 2:05-CV-145-BES-GWF, 2006 WL 1582126
(D. Nev. June 5, 2006) 14

Tobert v. Ohio Dep't of Transport,
172 F.3d 934 (6th Cir. 1999) 17

United States v. Hallmark Homes, Inc.,
No. CV01-432-N-EJL, 2003 WL 23219807
(D. Idaho Sept. 29, 2003) 15

United States v. Taigen & Sons, Inc.,
303 F. Supp. 2d 1129 (D. Idaho 2003) 14, 15

Vill. of Bellwood v. Dwivedi,
895 F.2d 1521 (7th Cir. 1990) 9

Walker v. City of Lakewood,
272 F.3d 1114 (9th Cir. 2001) 9

Codes & Statutes

42 U.S.C. § 812 7

42 U.S.C. § 3604(f)(1-2) 13

42 U.S.C. § 3604(f)(3)(C) ..... *passim*

42 U.S.C. § 3604(f)(4) 2

42 U.S.C. § 3604(f)(5)(C) 2

42 U.S.C. § 3612(a) (1982) 8

42 U.S.C. § 3613(a)(1)(A) 4, 7, 13

Other

U.S. Supreme Court Rule 37.6 1

H. Rep. No. 100-711 100th Cong., 2d Sess. 1998, reprinted in 1988 U.S.C.C.A.N. 2173, 2179 1

56 Fed. Reg. 9473 (Guidelines) (Mar. 6, 1991) 3

Design Manual, Transmittal Letter from HUD Secretary Cuomo (April, 1998) 3

INTEREST OF *AMICI CURIAE*

Collectively, the *Amici* represent a broad cross-section of both public and private companies that design, construct, own, and manage multi-family housing throughout the United States as well as the National Multi Housing Council, which is the voice of the multifamily industry.[1] *Amici* are directly affected by the issues presented in the Petition filed by Village of Olde St. Andrews, Inc., and WKB Associates, Inc.

The FHA makes it unlawful to "design and construct" covered multifamily dwellings "for first occupancy" after March 13, 1991, in a manner that makes them inaccessible to persons with disabilities. 42 U.S.C. § 3604(f)(3)(C). The FHA itself vaguely establishes what is required to make covered units accessible, by requiring the following elements: "accessible and usable" public areas; sufficiently wide doors; and "features of adaptive design" such as an "accessible route into and through the dwelling," placement of certain controls (e.g. light switches) "in accessible locations," reinforcements in walls for grab bars, and "usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space." 42 U.S.C. § 3604(f)(3)(C)(i)-(iii). In the words of Congress, these are "modest requirements" designed to "result[] in features which do not look unusual and will not add significant additional costs." H. Rep. No. 100-711 100th Cong., 2d Sess. 1998, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179

[1] Pursuant to Rule 37.6 of this Court, *Amici* states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *Amici* made a monetary contribution to its preparation.

("House Report"). Thus, the FHA sets out an imprecise mandate of accessibility and adaptability that is unlike, for example, a national building code. The lack of specificity under the FHA makes clear that Congress intended that design professionals and builders would retain flexibility in designing apartments, and could continue to achieve diversity in home design and construction while meeting the basic accessibility and adaptability requirements of the FHA. In enacting the FHA, Congress did not direct or empower the Department of Housing and Urban Development ("HUD") to promulgate binding regulations setting forth mandatory accessible design features. Rather, Congress empowered HUD only to issue reports and technical guidance concerning accessibility. 42 U.S.C. § 3604(f)(5)(C). Lacking authority to create mandatory design standards, HUD provided several examples of guidance documents and "safe harbors" that could be utilized to ensure compliance.[2] These safe harbors generally exceed the minimum requirements of the FHA and are at times contradictory.

Given that the FHA is vague, the law is unsettled as to exactly what is required of those engaged in the design and construction of multi-family residences to design a unit that is "accessible." Consequently, significant litigation is underway nationally by public interest advocacy groups

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[2] For instance, the FHA created an explicit "safe harbor" for meeting accessibility requirements, namely compliance with the American National Standards for buildings and facilities providing accessibility and usability for physically handicapped people ("ANSI A117.1"). 42 U.S.C. § 3604(f)(4).

seeking to expand the law beyond that which is required under the legislative history.

Petitioners' case is not unique. It has been *Amici's* experience that interest groups have filed a large number of suits against both individual apartment owners as well as large corporations with nationwide property portfolios alleging the buildings do not meet the FHA's requirements. These cases are built through "testing" of properties and allegations based on whether the apartment units are constructed in a manner consistent with the various "safe harbors." In a typical case, the testers measure the dimensions of kitchens and bathrooms and then compare such measurements to the dimensions discussed in HUD's Fair Housing Act Guidelines and Design Manual. Liability is alleged based on discrepancies between the measurements and the Guidelines and Design Manual despite the fact that both state unequivocally that they are neither binding nor mandatory. *See* 56 Fed. Reg. 9473 (Guidelines) (Mar. 6, 1991); Design Manual, Transmittal Letter from HUD Secretary Cuomo (April, 1998). No individuals with disabilities have any role in these cases.

For example, the Equal Rights Center ("ERC"), a Washington DC-based advocacy group has engaged in a "series" of lawsuits against residential apartment and condominium developers. According to the ERC's press releases, it has filed suit against at least seven developers, some of which own tens of thousands of apartment units in 20 or more states.[3] The suit filed by the ERC against *Amicus* Post Properties, Inc. alleges FHA violations at "more than 60

[3] *See* Equal Rights Center, Media Room, *at* http://www.equalrightscenter.org/index_files/Page319.htm (last visited November 27, 2007).

apartment complexes in 7 states, including more than 20,000 individual apartment units."[4]

To date, the lower courts have been reluctant to dismiss such suits for lack of standing, despite the fact that in many cases the plaintiffs' only theory of injury is that they utilized and diverted resources to "test" properties. This would allow, for example, a Washington-DC based group such as ERC to have standing to challenge the design of a building located in Texas even though the ERC provides no services in that state, has no members in that state and is unaware of any persons with disabilities that actually reside or sought to reside in that building. The "injury" is at best self-inflicted.

Equally troubling, some lower courts have been reluctant to interpret the FHA's statute of limitations based on the actual "termination" of the alleged discriminatory housing practice, 42 U.S.C. § 3613(a)(1)(A), choosing instead to adopt the "continuing violation" doctrine. Under this theory, as long as an apartment unit is out of compliance with the FHA (however that may be defined), the statute of limitations never tolls. The result is the statute of limitations is rendered a nullity and there is no repose for builders and designers. It has been Amici's experience that suits brought against designers, developers, owners, and managers of apartment communities are alleged to never be time-barred, even though the action leading to the alleged discriminatory conduct, i.e., the process of designing and constructing the building, took place many years ago. This exposes any party who had any

[4] *See* Equal Rights Center, Press Release: Post Properties, *at* http://www.equalrightscenter.org/index_files/Page3029.htm (last visited November 27, 2007).

interest in the design, construction or ownership of the building to the constant threat of litigation.

The end result of such interpretations of these important jurisdictional issues are lawsuits where the designers or builders of apartment communities must defend the compliance of every single property constructed after the FHA's date of enactment across the entire country. The discovery process alone requires expenditures of incredible resources and disruption of business (both to produce documents related to the design of buildings and to allow access to the building and the residences for expert inspections). The mere threat of the discovery process can lead to capitulation – resulting in monetary settlements as well as the requirement to undertake retrofits to make the buildings comply with many (but generally not all) of the design features set forth in the various "safe harbors" or guidelines discussed above. The ultimate cost of such settlements is wide ranging — from thousands to millions of dollars -- often dependent on the cost per unit of the retrofits.

Amici urges the Court to consider the question of whether advocacy groups with limited geographical missions and scope can demonstrate through testing alone the necessary injury to maintain suits of this breadth. Moreover, *Amici* requests the Court to settle the question of whether the continuing violation doctrine applies to toll the statute of limitations or the statute of limitations effectively time bars suits two years after the discrete acts of design and construction are completed.

SUMMARY OF THE ARGUMENT

As noted above, Petitioners are typical of companies who design and construct multi-family housing projects and have been sued by public interest groups because of alleged FHA design and construct violations. Petitioner WKB

Associates, Inc. ("WKB"), a residential development company based in Louisville, Kentucky, built three multifamily housing complexes in Jefferson County, Kentucky between 1993 and 2001. Pet. App. 8a. These complexes were the condominium developments Village of Olde St. Andrews, the Village of Deer Creek, and Greenhurst Condominiums. Pet. App. 8a.

Respondents Fair Housing Council and Center for Accessible Living are non-profit corporations concerned with housing discrimination issues, including accessibility for persons with disabilities. Pet. App. 8a. Respondents filed suit against Petitioners alleging that Petitioners engaged in disability discrimination in the design and construction of the three condominium developments. Pet. App. 7a. Respondents based their suit on an observation of steps leading up to the residences of Village of Olde St. Andrews and subsequent "testing" at the property by disabled individuals who did not reside there, but rather entered and inspected the property for FHA violations with no intent of living there. Pet. App. 9a.

Before the lower courts, Petitioners argued that Respondents lacked standing and that their claims were barred by the statute of limitations. Both the district court and the Sixth Circuit held that the Fair Housing Council had standing based on utilization of resources for litigation expenses and pre-litigation investigations. Pet. App. 9a, 26a. Additionally, the Sixth Circuit held that Respondents' claims were not barred by the statute of limitations because the continuing violation doctrine applied to toll the limitations period until the very last condominium unit was sold at Petitioners' properties. Pet. App. 33a.

This Court's review of the Sixth Circuit decision is necessary because the Sixth Circuit's holding conflicts with those of other circuit and district courts. And, these other courts' holdings are more consistent with this Court's past standing precedent, *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 563 (1992), and give greater effect to the plain language of the FHA's statute of

limitations, *see* 42 U.S.C. § 3613(a)(1)(A). An organization such as a non-profit advocacy group should not be able to establish an injury sufficient to confer standing when that organization has demonstrated no injury independent of testing and litigation costs. An injury based on resources utilized on litigation related expenses, including pre-litigation investigation and testing, is self-inflicted; it is neither concrete and particularized nor fairly traceable to any act of the designer or owner of the building. Additionally, the acts of design and construction are discrete acts that terminate when the design or construction is completed. At that point, the discriminatory act, if any, has taken place and the statute of limitations is therefore triggered. The continuing violation doctrine has no application to section 3604(f)(3)(C) of the FHA.

ARGUMENT

I. THE APPLICATION OF *HAVENS* TO FHA DESIGN AND CONSTRUCTION CASES MUST BE CLARIFIED.

The Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), has been relied upon to varying degrees as a basis for decisions regarding organizational standing and the interpretation of the statute of limitations in cases alleging FHA section 3604(f)(3)(C) violations. *Havens*, although an FHA case, is not a design and construction violation case. Instead, the Court in *Havens* discussed racial steering, a discriminatory practice significantly different from design and construction, especially in terms of the discriminatory act that triggers the statute of limitations. In addition, the discussion of organizational standing in *Havens* is broadly worded and must be clarified for cases in which the only alleged injury is resources utilized for or diverted to litigation.

In *Havens*, the plaintiffs—individuals and an organization—brought an action against an owner of an apartment complex, alleging that the owner practiced racial steering. *Havens*, 455 U.S. at 366. The *Havens* Court considered the standing of the organization as well as the then-current statute of limitations provision. *Id.*

As to standing, the Court held that "the sole requirement for standing to sue under § 812 [of the FHA] is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendants' actions he has suffered a 'distinct and palpable injury.'" *Havens*, 455 U.S. at 372. The Court found that the organization had demonstrated standing, and thus an injury in fact, because it sufficiently alleged that the defendant's racial steering practices had "perceptively impaired [the organization's] ability to provide counseling and referral services," and that this impairment constituted a "concrete and demonstrable injury." *Id.*, at 379.

Regarding the statute of limitations, the Court held that the continuing violation doctrine applied to the organization's claims: "Where a plaintiff pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." *Havens*, 455 U.S. at 380-81 (citing the then-current statute of limitations provision, 42 U.S.C. § 3612(a) (1982)). The Court further reasoned that the plaintiff's claims were "based not solely on isolated incidents involving the two respondents, but on a continuing violation manifested in a number of incidents-including at least one . . . that is asserted to have occurred within the 180-day period." *Havens*, 455 U.S. at 381.

These holdings in *Havens* have been used and interpreted in conflicting ways by courts considering allegations of FHA design and construction violations brought by organizational plaintiffs. It is important for this Court to settle such conflicts and to provide guidance considering the effect misinterpretation of that precedent

has on the rash of Section 3604(f)(3)(C) litigation currently before lower courts.

II. ORGANIZATIONAL STANDING CANNOT BE ESTABLISHED UNLESS THE ORGANIZATION DEMONSTRATES AN INJURY IN FACT INDEPENDENT OF RESOURCES DIVERTED TO LITIGATION RELATED COSTS.

Several courts, including the Sixth Circuit, have misinterpreted the language of *Havens* to allow standing of advocacy groups that have failed to demonstrate the requisite impairment to their activities and/or diversion of resources beyond the litigation they are pursuing. *See* Pet. App. 26a; *see also Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990). For example, the Sixth Circuit citing *Havens* along with Sixth Circuit precedent, held that pre-litigation investigation expenses are sufficient to confer standing. Pet. App. 15a, 20a (citing *Havens*, 455 U.S. at 378; *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993)). Specifically, the Fair Housing Council's allegations of incurring monetary pre-litigation expenses and lost opportunity costs associated with the investigation, which included training and deploying testers, was considered sufficient injury in light of *Havens*.

In contrast, various other courts, including the D.C. Circuit, the Fifth Circuit, the Third Circuit, and the Ninth Circuit, have held that an organization must allege and demonstrate an injury that is separate from and independent of litigation costs. *See, e.g., Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990); *Fair Housing Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 79 (3d. Cir. 1998); *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994); *Walker v. City of Lakewood*, 272 F.3d 1114, 1124, n.3 (9th Cir. 2001). This is clearly the correct interpretation of "injury"

in light of this Court's other precedents related to organizational standing.

A. An Alleged Injury Based on the Costs of Litigation Alone is Insufficient to Confer Standing Upon an Organization.

In determining organizational standing, a court conducts the "same inquiry as in the case of an individual" to ensure that the organization has a "personal stake in the outcome of the controversy." *Havens*, 455 U.S. at 378. Thus, the organization must sufficiently allege and demonstrate that it has suffered an injury in fact that is concrete and particularized as well as actual and imminent. *Lujan*, 504 U.S. at 560. In addition, the organization must show that its alleged injury is "fairly traceable to the challenged action of the defendant." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000)

Generally, in FHA design and construction cases, the organizational plaintiff alleges as an injury frustration of its mission and diversion of resources as opposed to actual injury to members. For example, Respondent Fair Housing Council alleged that it directed resources toward training and employing testers to investigate the Village of Olde St. Andrews. Pet. App. 26a. However, the time and money that an organization spends in bringing a suit against a defendant does not and should not constitute an injury in fact for standing purposes. *See Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994). In other words, "an organization cannot . . . manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit." *Spann*, 899 F.2d at 27. As the Fifth Circuit has explained, the reasoning for this rule is that an organization has "no legally protected interest in not expending their resources on behalf of individuals for whom they are advocates, at least where the only resources 'lost' are the legal costs of a particular advocacy lawsuit." *Ass'n for Retarded Citizens*, 19 F.3d at 244.

B. An Alleged Injury Based Solely on the Costs of Pre-Litigation Investigation and Testing is Equally Insufficient to Confer Standing.

There are numerous cases where there is no individual plaintiff alleging discrimination from the construction or design of an apartment. In such cases (including the Sixth Circuit's decision) an organization has simply made a unilateral decision to undertake investigation and testing. The Sixth Circuit held that regardless of how the organization learned of Petitioners' alleged discriminatory acts, "any action [the organization] takes in combating that discrimination is fairly traceable to the defendant's discriminatory acts." Pet. App. 25a. Yet, this holding is legally erroneous in that it clearly requires no showing of causation whatsoever.

The rationale regarding manufactured injury should be equally applicable to such pre-litigation investigation and testing. Any alleged injury based on the cost of testing does not result from the actions of the defendant but rather from the plaintiff's own budgetary choices; the alleged injury is "self-inflicted." *BMC Mktg.*, 28 F.3d at 1276. A court cannot reasonably hold that a defendant has injured a plaintiff merely because the plaintiff decided that its money ought to be spent on testing rather than on its other operations. If a court were to so hold, "the time and money that plaintiffs spend in bringing suit against a defendant would itself constitute sufficient 'injury in fact'" and "a circular position that would effectively abolish the requirement [of injury in fact] altogether" would result. *BMC Mktg.*, 28 F.3d at 1276.

This view of self-inflicted injury is consistent with *Havens*. "The Court [in *Havens*] did not base standing on the diversion of resources from one program to another, but rather on the alleged injury that the defendants' actions themselves had inflicted upon the organization's programs." *BMC Mktg.*, 28 F.3d at 1277. Where no individual plaintiff has made a specific complaint concerning the accessibility of a building and all there has

been is testing, the defendant has inflicted no actual injury on the membership organization's programs. It is the organization's independent choice to test properties and that alone should not be enough to confer standing.

C. The *Havens* Holding Related to Organizational Standing Must Be Clarified.

Given the conflicting interpretations of what must be alleged and demonstrated to establish organizational standing, it is important for this Court to clarify *Havens*. This Court should hold that for an organization to demonstrate a sufficient injury under the FHA, that organization must allege damages separate and apart from those caused by preparing for litigation itself. In other words, the organization must allege and demonstrate an additional impairment (besides litigation costs) to the organization's efforts against discrimination. *See, e.g., Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 499, n.8 (E.D. Va. 2002).

If this Court fails to so clarify *Havens*, the extensive litigation under Section 3604(f)(3)(C) will only continue. The readiness of some courts to erroneously find standing, even where there is no concrete injury fairly traceable to the defendant's actions, is being taken advantage of by organizations that have gone beyond the geographical scope of their mission and alleged violations at properties throughout the United States. These organizations (and their members) have not suffered a sufficient injury in fact as to properties inside of their community, much less those in far away states. These organizations have not alleged any injury to their members or to their missions such as counseling or education activities that is fairly traceable to alleged FHA violations at the properties; they have alleged only that the properties have been tested. Testing alone should not establish standing. This Court needs to clarify the issue of organizational standing for litigious advocacy groups and organizations before the requirement of standing is effectively extinguished altogether.

III. THE STATUTE OF LIMITATIONS FOR FHA DESIGN AND CONSTRUCTION VIOLATIONS IS TRIGGERED BY THE COMPLETION OF THE DESIGN AND CONSTRUCTION. THE CONTINUING VIOLATION DOCTRINE IS INAPPLICABLE TO SECTION 3604(f)(3)(C) OF THE FHA.

The governing statute of limitations for private FHA claims states: "An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). For design and construction violations pursuant to section 3604(f)(3)(C), this limitations provisions has been interpreted in a variety of ways, with the major differences being what is considered the triggering date for the limitations period and whether the continuing violation doctrine can be applied.

A. The Statute of Limitations is Triggered by the Completion of Design and Construction as Indicated by the Date of the Last Certificate of Occupancy.

A logical starting point for the Court's consideration of the applicability of the continuing violation doctrine is a decision on what constitutes the triggering event on which the statute of limitations begins to run. The relevant provision of the FHA states that the limitations period is triggered "after the occurrence or the termination of an alleged discriminatory housing practice," 42 U.S.C. § 3613(a)(1)(A). Accordingly, the first issue in this inquiry is what constitutes the discriminatory housing practice as related to a construction and design violation.

The Sixth Circuit interpreted the discriminatory housing practice to relate back to the general provision of 42 U.S.C. § 3604(f)(1-2), which makes it unlawful to "discriminate in the sale or rental, or otherwise make unavailable or deny a

dwelling to any buyer or renter." Pet. App. 29a. On that basis of availability, the Sixth Circuit held that the date of the last unit sold is the triggering date for the statue of limitations. Pet. App. 33a.[5]

However, other courts — including two decisions issued since Petitioners filed their Petition — have interpreted the discriminatory housing practice to relate back to section 3604(f)(3)(C); the provision making it a discriminatory act to fail to design and construct accessible dwellings. *Garcia v. Brockway*, 503 F.3d 1092, 1096 (9th Cir. 2007); *Kuchmas v. Towson Univ.*, No. RDB 06-3281, 2007 WL 2694186, *5 (D. Md. Sept. 10, 2007). *Garcia* held that the statute of limitations begins to run when the design and construction is completed. *Garcia*, 503 F.3d at 1096; *see also Moseke*, 202 F. Supp. 2d at 503; *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1144 (D. Idaho 2003); *Thompson v. Mountain Peak Assocs., LLC*, No. 2:05-CV-145-BES-GWF, 2006 WL 1582126, *2 (D. Nev. Jun2 5, 2006). This is a logical interpretation because the "alleged discriminatory housing practice," is the wrongful design and construction, which occur when such processes are complete. Hence, the actual discriminatory practice is the act of designing and constructing dwellings in violation of the requirements of the FHA, not making the unit unavailable. *Id.*

The date of completion for design and construction varies among properties and jurisdictions, but many courts, including *Garcia*, have found that issuance of a certificate of occupancy is the best indicator of the date of completion.

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[5] Although this is a firm deadline, it becomes confusing if a unit is resold and is of little help in the context of rental housing. One question the Sixth Circuit failed to address in holding that the date of sale is the triggering date for the statute of limitations, is whether the statute of limitations begins to run again at each sale. If so, this would practicably defeat the purpose of the statute of limitations.

See Garcia, 503 F.3d at 1096; *Taigen*, 303 F. Supp. 2d at 1144; *United States v. Hallmark Homes, Inc.*, No. CV01-432-N-EJL, 2003 WL 23219807 (D. Idaho Sept. 29, 2003). At that point, all design and construction decisions have been completed and the property can be lived in, whether in a sale or rental context. Regardless of what the courts ultimately utilize as an indicator of the date of completion, it is clear that *Garcia* and like courts have provided a more rational interpretation of the statute of limitations as applied to section 3604(f)(3)(C).

B. Many Courts Inappropriately Rely on *Havens* as Grounds for Applying the Continuing Violation Doctrine to Section 3604(f)(3)(C) allegations.

Equally troubling to *Amici* is the fact that certain courts, again relying primarily on *Havens*, have rendered the statute of limitations irrelevant by applying the continuing violation doctrine to Section 3604(f)(3)(C) claims. This reliance on *Havens* is misplaced. Although an FHA case where the Court upheld application of the continuing violation doctrine, the rationale of *Havens* is not properly applied in the context of section 3604(f)(3)(C). The alleged FHA violation in *Havens* was racial steering, a discriminatory act or practice that by definition continues over time. *Havens*, 455 U.S. at 380. Racial steering as a practice cannot be determined based on one event; rather racial steering is based on several events over time. *Id.* at 381. Hence, the Court found that the alleged racial steering constituted a continuing violation because (1) it continued to occur within the limitations period, and (2) the nature of racial steering is such that it is "manifested in a number of incidents." *Id.* In other words, the practice of racial steering can only be fully determined after looking at a series of alleged discriminatory acts.

Courts, including the Sixth Circuit, have inappropriately relied on *Havens* to apply the continuing violation doctrine to alleged design and construction violations. The Sixth Circuit, in finding that the discriminatory practice that triggers the statute of limitations is the sale or rental of a

dwelling, held that "the continuing violations doctrine applies to toll the statute of limitations until the sale of the last unit in a development." Pet. App. 33a. The court further held:

> where the plaintiff can show that the owner of several housing developments engaged in a continuous policy or practice with regard to the noncompliant design and construction of each of the developments, the continuing violation doctrine may toll the running of the limitations period until the last unit of all of the implicated developments is sold.

Id.

Yet, unlike racial steering, design and construction are discrete acts with a clear ending point—the date on which construction or design is completed for an individual unit. The Sixth Circuit failed to recognize that the Court in *Havens* indicated that there is a distinction between one-time events and continuing practices, holding that the continuing violation doctrine did not apply to the plaintiff tester's claims, which were based on "four isolated occasions" in which she received false information as to housing availability. *Havens*, 455 U.S. at 381. Accordingly, the rationale for applying the continuing violation doctrine in *Havens* should have no applicability to design and construction cases.

C. Applying the Continuing Violation Doctrine to Allegations of Design and Construction Violations Will Render the Statute of Limitations Meaningless.

Applying the continuing violation doctrine to alleged Section 3604(f)(3)(C) violations, as done by the Sixth Circuit, renders the statute of limitations "meaningless." *Kuchmas*, 2007 WL 2694186 at *5; *Moseke*, 202 F. Supp. 2d at 507, 508. In order to give full weight to the statute of limitations, the alleged continuing effects of the initial discriminatory act of design and construction cannot be

relevant to the triggering date. *See Moseke*, 202 F. Supp. 2d at 507.[6] Otherwise, as long as the building stands there is no relief from possible liability.

Both *Garcia* and *Kuchmas* provide authority issued since Petitioners filed their Petition that rejects the application of the continuing violations doctrine in Section 3604(f)(3)(C) cases. *See Garcia*, 503 F.3d at 1097; *Kuchmas*; 2007 WL 2694185 at * 5. They logically hold that the statute of limitations is triggered by the termination of the design and construction. *Id.* Because design and construction is a one-time event, application of the continuing violation doctrine is nonsensical. As the *Garcia* court held, the discriminatory practice, *i.e.* failure to design and construct in compliance with the FHA, "is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase." *Garcia*, 503 F.3d at 1097; *see also Kuchmas*, 2007 WL 2694186 at *4 (quoting *Moseke*, 202 F. Supp. 2d at 506). In sum, "[a]lthough the ill effects of a failure to properly design and construct may continue to be felt decades after construction is complete,

[6] This view is consistent with case law rejecting the application of the continuing violation doctrine where an effect is continuing but the defendant's act is not. *See Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991) (holding that "[a] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation"); *Tobert v. Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999) (holding that in a complaint alleging discriminatory allocation of sound barriers along the highway, the continuing lack of such barriers constituted a "continuing ill effect," and was not the result of continuing unlawful acts); *Perez v. Laredo Junior College*, 706 F.2d 731, 734 (5th Cir. 1983) (holding that even though the damages resulting from the denial of the claim for pay may have continued, the wrongful act itself did not and therefore did not constitute a continuing violation).

failing to design and construct is a single instance of unlawful conduct." *Id.* The statute of limitations, thus, runs from a discrete act not that act's ill effects.[7]

In finding the continuing violation doctrine inapplicable to FHA design and construction violations, the *Garcia* court accounted for one of the underlying purposes of the statute of limitations, which is "protect[ing] defendants from the burden of defending claims arising from . . . decisions that are long past." *Garcia*, 503 F.3d at 1099 (quoting *Del. State. College v. Ricks*, 499 U.S. 250, 256-57 (1980). *Amici* are concerned that if the continuing violation doctrine were to apply to FHA design and construction provisions, then "the FHA's statute of limitations would provide little finality for developers." *Id.* at 12721. Developers who retain their properties would be forever liable, while developers who sell their properties "would be required to repurchase and modify (or destroy) buildings containing inaccessible features in order to avoid design-and-construction liability for every aggrieved person who solicits tenancy from subsequent owners and managers." *Id.* As the Ninth Circuit logically reasoned, "[i]f Congress wanted to leave developers on the hook years after they cease having any association with a building, it could have phrased the statute to say so explicitly." *Id.*

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[7] This Court's precedent has also shown that a plaintiff cannot aggregate discrete acts of alleged discriminatory conduct into a series of related acts in order to apply the continuing violation doctrine. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (holding that "discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period"). Instead, "each discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* In FHA design and construction cases, the design and construction of each unit or property is a discrete act.

To prevent the injustice and prejudice that results from the misapplication of the continuing violations doctrine based on *Havens* as precedent, this Court must decide this issue independently for FHA design and construction violations, and hold that it is inapplicable.

CONCLUSION

It is no exaggeration to assert that *Havens* has been misused and twisted by courts trying to squeeze their FHA design and construction discrimination claims into the *Havens* mold. In view of the wave of litigation by advocacy groups with no concrete or particularized injury beyond the costs they have unilaterally expended on testing, the Court must clarify the necessary elements for organizational standing. Organization standing cannot be demonstrated unless an organization has suffered and injury independent of the litigation the organization chooses to pursue. Similarly, *Havens* is inappropriate and distinguishable precedent for the statute of limitations issue and it is appropriate for this Court to hold with finality that the continuing violations doctrine does not apply to Section 3604(f)(3)(C) of the FHA.

For the all of the foregoing reasons, the Petition should be granted.

November 28, 2007

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In The
Supreme Court of the United States

VILLAGE OF OLDE ST. ANDREWS, INC.;
WKB ASSOCIATES, INC.,
Petitioners,

v.

FAIR HOUSING COUNCIL, INC.;
CENTER FOR ACCESSIBLE LIVING, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Background. 3

B. Course of Proceedings. 7

REASONS FOR DENYING THE PETITION ... 10

I. The Record In this Case Presents No Issue Upon Which the Courts of Appeals Are in Conflict. 10

A. The Sixth Circuit's Standing Decision Does Not Present Either a "Conflict" Or a Question of Exceptional Importance. 11

B. WKB's Petition Mischaracterizes the Substantial Evidence of Agency Harm in this Case. 15

C. The Sixth Circuit's Decision Does Not Conflict with this Court's Article III Jurisprudence. 18

II. The Sixth Circuit's Application of the Fair Housing Act's Statute of Limitations Is Correct. In Any Event, It Would Be Premature to Address the Issue in this Case. 21

A. Review of This Issue Is Premature. ... 21

B. The Decision Below Is Correct. 22

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Arlington Heights v. Metropolitan Housing Development Corp.,
429 U.S. 252 (1977) 19

Bragdon v. Abbott,
524 U.S. 624 (1998) 1

Branti v. Finkel,
445 U.S. 507 (1980) 2, 10

City of Edmonds v. Oxford House, Inc.,
514 U.S. 725 (1995) 26

Daimler Chrysler Corp. v. Cuno,
126 S. Ct. 1854 (2006) 18

Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers,
141 F.3d 71 (3d Cir. 1998) 11-14

Flast v. Cohen,
392 U.S. 83 (1968) 18, 19

Garcia v. Brockway,
2007 U.S. App. LEXIS 22428 (9th Cir. Sept. 27, 2007) 21

Gladstone Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 19

Goodman v. Lukens Steel Co.,
482 U.S. 656 (1987) 2

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) ..... passim

Hein v. Freedom From Religion Foundation,
127 S. Ct. 2553 (2007) 18

HOME, Inc. v. The Cincinnati Enquirer,
943 F.2d 644 (6th Cir. 1991) 12

Ledbetter v. Goodyear Tire & Rubber Co., Inc.,
127 S. Ct. 2162 (2007) 22-24

Louisiana ACORN Fair Hous. v. LeBlanc,
211 F.3d 298 (5th Cir. 2001), *cert. denied*, 532
U.S. 904 (2001) 14

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 18

National R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 22, 23

Penfield Co. v. SEC,
330 U.S. 585 (1947) 3

Smith v. Butler,
366 U.S. 161 (1961) 22

Spann v. Colonial Village, Inc.,
899 F.2d 24 (D.C. Cir. 1990) .. 11, 12, 14, 19, 20

Ticor Title Ins. Co. v. Brown,
511 U.S. 117 (1994) 22

Trafficante v. Metropolitan Life Ins. Co.,
409 U.S. 205 (1972) 19, 25, 26

U.S. v. Edward Rose & Sons,
246 F. Supp. 2d 744 (E.D. Mich. 2003), *aff'd*, 384
F.3d 258 (6th Cir. 2004) 26

Constitutional and Statutory Provisions

U.S. Const. art. III ..... passim

42 U.S.C. §3604(f)(1) 1, 25

42 U.S.C. §3604(f)(3) 1, 25

42 U.S.C. §3613(a)(1)(A) 25

Fair Housing Act ..... passim

Fair Housing Amendments Act 26

Rules

S. Ct. R. 12.6 3

Other Authorities

134 Cong. Rec. S19720
(statement of Sen. Harkin) 23

Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Senate Subcomm. on the Constitution of the Comm. on the Judiciary, 100th Cong. at 25 (1987) 23

INTRODUCTION

Under the Fair Housing Act, it is unlawful to discriminate in the sale or rental of a dwelling, or "to otherwise make unavailable or deny" a dwelling, because of disability.[1] 42 U.S.C. §3604(f)(1). "Discrimination" based on disability is defined by the Act to include (but is not limited to) a failure to design and construct covered multi-family dwellings that are accessible to persons with disabilities. 42 U.S.C. §3604(f)(3).

Private fair housing organizations like respondent Fair Housing Council have standing under the Act to sue on their own behalf for injuries they have sustained. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). They suffer "injury in fact" whenever the defendant's practices impair the organization's activities, including the organization's noneconomic interest in encouraging open housing, and cause any "drain on the organization's resources." *Id.*

Petitioners erroneously claim that this case requires resolution of a split in the circuits on a narrow post-*Havens* question of standing under the Act, specifically whether "pre-litigation expenditures" are sufficient to sustain standing under the Act. Pet. 16. Even if there were a split on this issue – which

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[1] The Act uses the term "handicap" instead of the term "disability," but both terms have the same legal meaning. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). The Brief in Opposition uses the term "disability," which is more generally accepted.

there is not, *see infra* – this case does not present that question for resolution. As the Court of Appeals recognized, the Fair Housing Council here satisfied even the most stringent standard for fair housing agency standing adopted by any circuit.

To bolster their purported conflict, petitioners are forced to mischaracterize the record. Although petitioners baldly assert that there is "no evidence" to sustain the Fair Housing Council's standing, Pet. 15, both the district court and the Court of Appeals found otherwise. The record is filled with sworn testimony of agency harm sufficient to meet the *Havens* standard. Ordinarily this Court will decline to review factual determinations upon which both lower courts have agreed. *Branti v. Finkel*, 445 U.S. 507, 512 n. 6 (1980); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

Nor is there any reason for this Court to consider the lower court's application of the Fair Housing Act's statute of limitations in this case. It is premature to address that issue because the Courts of Appeals have not yet had sufficient opportunity to consider it. The decision below is the first appellate decision to address the applicability of the Act's statute of limitations in design and construction cases. Moreover, because the statute of limitations does not affect two of the petitioner WKB's three housing developments involved in this case – and does not affect petitioner Village of Olde St. Andrews, Inc., at all – resolution of that question will not dispose of this litigation. Finally, contrary to petitioners' suggestion, the Court of Appeals' analysis is correct.

STATEMENT OF THE CASE

A. Background.

Petitioner WKB Associates, Inc.,[2] is a developer and builder of multi-family dwellings covered by the Fair Housing Act. Between 1993 and 2001, WKB constructed three condominium developments in Jefferson County, Kentucky: (1) Greenhurst Condominiums ("Greenhurst"); (2) the Village of Olde St. Andrews ("Olde St. Andrews"); and (3) the Village of Deer Creek ("Deer Creek"). Pet. App. 40a – 44a. Greenhurst was completed in 1995, and consists of 156 dwelling units. Olde St. Andrews was completed in 1999, and consists of 112 dwelling units. Deer Creek was completed in 2001, and consists of 64 dwelling units. *Id.*

It is undisputed that the dwelling units and common areas constructed by WKB at these developments do not comply with the accessibility requirements set forth in the Fair Housing Act. Some features of non-compliance were conceded by WKB at trial (TR. 52, 58, 139, 196, 258, Apx. pp. 811, 817, 898,

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[2] The Petition for Writ of Certiorari is also purportedly filed on behalf of "Village of Olde St. Andrews, Inc." Pet. ii. But no judgment was granted against that entity, and it did not appeal the trial court's final judgment. It was not a party to the appeal below. *See, e.g.*, Pet. App. 4a, 8a (noting appeal only by defendant WKB); May 19, 2005 Notice of Appeal (Apx. 124-125); April 26, 2005, Memorandum and Order (Apx. 102-104). It does not, therefore, have standing to file a petition in this Court. *Penfield Co. v. SEC*, 330 U.S. 585, 589 (1947); S. Ct. R. 12.6.

955),[3] while others were specifically identified by the district court after hearing all the evidence at trial. (R. 76 Memorandum, Opinion and Order, Apx. pp. 83-92). The substantial level of non-compliance may be attributable to the fact that WKB's architect and owners claimed to have "never heard of" the Fair Housing Act. (Brown at TR. 210-211, 224, Apx. pp. 969-970, 983; Koch at TR. 292, Apx. p. 1051).[4] None of the court's findings of non-compliance were challenged on appeal.

On July 22, 1998, respondent Fair Housing Council, Inc. ("the Council"), discovered that WKB's construction of dwellings at the Village of Olde St. Andrews did not comply with the Act. Pet. App. 102a – 105a (Deposition of Tony Baize, "Baize Dep."). Thereafter, testers[5] and investigators employed by the Fair Housing Council and respondent Center for

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[3] Petitioners did not include in their Appendix any portion of the Trial Transcript in this case. References to the Trial Transcript can be found in the Joint Appendix filed in the Court of Appeals below.

[4] WKB observes that local building code officials failed to say anything about compliance with the Fair Housing Act. Pet. 2-4. Such officials are not, however, responsible for enforcement of the Act. Compliance is the responsibility of individual builders, designers, and owners.

[5] Testers are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful housing practices. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). Here, respondents' testers visited the building sites in person, and if violations seemed apparent, follow-up testers were sent to conduct more detailed inspections. Pet. App. 110a (Baize Dep. at 21).

Accessible Living, Inc., conducted an investigation of the Village of Olde St. Andrews. Specifically, the Council visited and inspected the development; took and processed digital photos of the development; trained, supervised, and debriefed testers; conducted research into the ownership of the development; located and reviewed the original design plans and construction permits; and performed other tasks. Pet. App. 71a-74a (Plaintiff's Responses to Defendants' First Interrogatories, No. 3); Pet. App. 26a fn. 4. The Council also spent a substantial amount of staff time interviewing owners of dwellings at Olde St. Andrews. Pet. App. 88a – 98a (Plaintiff's Responses to Defendants' First Interrogatories, No. 15). The Council and the Center determined that Olde St. Andrews was not accessible to people with disabilities as required by the Fair Housing Act, and on October 6, 1998, filed their original Complaint.[6]

Soon thereafter, the Council devoted additional resources to investigating WKB's other two developments, Greenhurst and Deer Creek. The Council determined that those developments, too, were non-compliant. *Id.* They promptly amended their complaint to include Greenhurst and Deer Creek.

The investigation of WKB's non-compliant housing developments diverted the Council's resources away from other projects. Pet. App. 125a – 129a, 135a, 141a, 151a (Baize Dep. at 36, 40-44, 70, 76-77, 118); Pet.

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[6] In addition to WKB and Village of Olde St. Andrews, Inc., the complaint named Standard Country Club, Inc., Sabak, Williams and Lingo, Inc., and Ken Brown, architect, as defendants. These defendants were dismissed prior to trial.

App. 71a – 74a (Plaintiff's Responses to Defendants' First Interrogatories, No. 3). The Council diverted resources from its normal activities, including: conducting, attending, and speaking at fair housing seminars; providing tester training; providing advice and referral services to the public; publishing the *National Fair Housing Advocate* and other publications; and conducting an insurance testing project. *Id.*[7]

In addition, the Council initiated several new projects to undo the damage to its mission caused by WKB's non-compliance. Pet. App. 71a – 74a (Plaintiff's Responses to Defendants' First Interrogatories, No. 3). It stepped up presentations at local and regional events specifically focused on disability issues, increased the number of accessibility tests, and recruited additional testers with disabilities. *Id.* The Council also "got a lot more involved with accessibility and getting the word out about accessibility in new construction." Pet. App. 130a (Baize Dep. at 48-49). It would have focused its limited resources on education and outreach had it not been working on this investigation. Pet. App. 137a (Baize Dep. at 72).

In his deposition, the Council's Executive Director, Tony Baize, explained in detail how WKB's non-compliant dwelling units frustrated the Council's mission. Part of the Council's mission is to educate the

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[7] Respondent Center for Accessible Living also diverted resources to this investigation. It recruited persons who used wheelchairs and had other disabilities to conduct the testing. It participated in meetings with the Council's representatives. Pet. App. 104a – 105a (Baize Dep.).

community about the non-discrimination requirements of the Fair Housing Act, and to ensure full access to persons with disabilities. Pet. App. 116a – 119a (Baize Dep. at 27-30). The construction of non-compliant units communicated the opposite message to the community, *i.e.*, that this type of construction is permissible and that persons with disabilities "cannot have access to this new house even though [we told them] they should have access to it." Pet. App. 123a – 124a (Baize Dep. at 34-35). "[U]ntil the defects in these buildings are corrected, we see them as ongoing frustration to our mission to eradicate discrimination in housing." Pet. App. 124a (Baize Dep. at 35). The Council's frustration-of-mission damages were further documented in Answers to WKB's Interrogatories. Pet. App. 68a – 71a (Plaintiff's Responses to Defendants' First Interrogatories, No. 2).

B. Course of Proceedings.

After the parties' cross motions for summary judgment were denied, *see* 250 F. Supp. 2d 706 (W. D. Ky. 2003), a bench trial was conducted before District Judge John Heyburn on June 2-3, 2003. As part of the trial proceedings, and without objection from either party, the district court expressly incorporated and relied upon the facts, testimony, and evidence submitted to it as part of the summary judgment proceedings (TR. at 5-6, 22, 34, 194, Apx. pp. 764-765, 781, 793, 953). In addition to the summary judgment evidence, the judge heard live testimony from plaintiffs' expert witness, several wheelchair users, owners of the condominiums, fair housing accessibility testers, the projects' architect, and the defendant's

corporate representative. The judge also viewed in person the dwellings and public areas at issue.

On June 18, 2003, the district court issued its findings of fact and conclusions of law. The court found substantial areas of non-compliance in the public and common use areas, and in the individual dwelling units, at all three developments. It ordered specific relief for 29 of the violations. It denied the respondents' request for the imposition of punitive damages against WKB, and continued further proceedings for consideration of an appropriate remedial order. A final remedial order was ultimately entered on April 26, 2005. An appeal followed.[8]

WKB argued on appeal that neither the Kentucky Fair Housing Council nor the Center for Accessible Living had organizational standing to sue under the Fair Housing Act. WKB argued that the agencies' investigation of its non-compliance was insufficient to confer standing. The appellate court rejected WKB's argument as to the Council's standing, finding that the Council had proved a sufficient injury-in-fact. Pet. App. 23a – 26a. The court noted with approval evidence in the record that the Council had diverted resources from other activities, and that it had suffered lost opportunity costs by having to investigate WKB's developments. Pet. App. 24a.

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[8] WKB attempted to appeal the district court's findings of fact and conclusions of law prior to the entry of a final appealable order. The Sixth Circuit dismissed WKB's first appeal for lack of appellate jurisdiction. *See* Order of December 7, 2004, Case Nos. 04-5749/5801 (6th Cir.).

In contrast, the court found that the Center for Accessible Living lacked standing to sue. The court concluded that the Center had engaged in no activity other than identify individuals who might serve as potential testers. Pet. App. 26a – 27a.

With respect to the statute of limitations, the Court of Appeals held that the trigger for the limitations period "will depend on the circumstances of each case." Pet. App. 32a. It held that the trigger for the statute will depend not on the date of completion of construction, but on the date there is an act connected with the "sale or rental" of that non-compliant dwelling. Pet. App. 33a.

> In the context of the construction and design of multifamily dwelling units that are inaccessible to disabled individuals, *the discriminatory act occurs during the sale or rental of that unit.* Thus, once a unit as been sold or rented, the discriminatory act is complete.

Pet. App. 31a (emphasis supplied). It also held that, because the continuing violation doctrine applies to claims brought under the Fair Housing Act (citing *Havens*), the statute of limitations is not triggered until the last unit in a covered development is sold. In this case, the court affirmed the trial court's ruling that the statute of limitations did not bar the Council's cause of action as to Greenhurst, the housing development completed in 1995, because the last unit was sold within two years of the filing of the complaint. The court's ruling on the statute of limitations affected only the units constructed at Greenhurst. There was no statute of limitations

challenge to the respondents' claims concerning the units being constructed at Olde St. Andrews and Deer Creek.

REASONS FOR DENYING THE PETITION

I. THE RECORD IN THIS CASE PRESENTS NO ISSUE UPON WHICH THE COURTS OF APPEALS ARE IN CONFLICT.

The Petition does not challenge the proposition that private fair housing organizations like respondent Fair Housing Council have standing under the Fair Housing Act to sue for injuries they have sustained. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Ordinarily the question of whether such injuries have been sustained is one of fact, and in this case both the district court and the appellate court found sufficient evidence of agency harm to satisfy the *Havens* standard. *See Branti v. Finkel*, 445 U.S. 507, 512 n. 6 (1980) (noting the Court's "settled practice" of accepting factual determinations in which both the district court and the court of appeals have concurred).

Petitioners erroneously claim that this case requires resolution of a split in the circuits on the narrow question of whether "pre-litigation expenditures" can be sufficient to sustain standing under the Act. Pet. 16. Even if there were a split on this issue – which there is not, see *infra* – this case does not present that question for resolution. As the Court of Appeals recognized, the Fair Housing Council's injury was not limited to "pre-litigation expenditures," and it satisfied even the most stringent standard for fair housing agency standing adopted by

any circuit. There is no basis to resolve a circuit split that is not fairly presented by the record.

A. The Sixth Circuit's Standing Decision Does Not Present Either a "Conflict" Or a Question of Exceptional Importance.

Petitioners claim that this Court should grant the petition because "there is manifest conflict" in the Courts of Appeals about whether "pre-litigation expenditures" are sufficient to satisfy Article III standing. Pet. 16.

In fact, there is no such conflict. To fabricate its purported "conflict," WKB relies on appellate court decisions suggesting that the costs *of litigation* cannot be the *sole* support for the standing of a fair housing organization to pursue litigation (citing *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990); *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71 (3d Cir. 1998); and other cases). Pet. 16-22. WKB then unfairly uses the term "pre-litigation expenditures" as if it is equivalent to the term "litigation costs," and suggests a conflict because respondents here did incur pre-litigation *investigation* costs, including the use of testers.

But the two concepts are not the same, and no circuit court has ever held that the expenditure of time and agency resources to investigate acts of discrimination, including the use of testers, is insufficient to sustain an agency's standing to sue under the Act or Article III. Instead, as the court below explained, the circuit courts differ on the extent to

which they will recognize standing based *solely* on the costs *of the litigation itself.* Pet. App. 16a-17a.

This case does not present that issue, as we show below, and the Sixth Circuit did not disagree with the decisions that petitioners cite.[9] The panel below clearly held that the Sixth Circuit *does* require something more than the expenditure of costs of litigation to support agency standing:

> [W]e require a plaintiff to show some injury that is independent of the costs of litigation . . . . [*HOME, Inc. v. The Cincinnati Enquirer,* 943 F.2d 644, 646 (6th Cir. 1991)] suggests that this Court does not preclude consideration of the costs of litigation when determining standing,

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[9] *Spann*, for example, did not even discuss the nature or extent of any pre-litigation investigation expenditures. The agency plaintiffs in *Spann* based their allegations of standing on the frustration of their corporate missions and the need to increase educational efforts to counteract the influence of the defendants' discriminatory acts. 899 F.2d at 27-31. On this basis, they were found to have standing. Likewise, the Third Circuit in *Montgomery Newspapers* did not hold that a fair housing agency could never rely on pre-litigation investigation costs to sustain its standing to sue. Rather, the Court held that the agency's claimed standing based on its diversion of resources to an independent investigation "fails for lack of proof." 141 F.3d at 78. The Court examined the record and sustained the district court's factual determination that the fair housing agency had not diverted any resources to a bona fide investigation. *Id.* It distinguished *Havens* on the ground that the organization in *Havens* "did something different" as a result of the particular conduct alleged to be illegal – just as the district court and the Court of Appeals found the Council had proved here.

> but additionally requires the plaintiff to prove some type of injury beyond these costs.

Pet. App. 19a. Thus, standing in this case was *not* based solely on the Council's litigation expenditures, and the Sixth Circuit *did* require evidence of agency injury beyond the costs of litigation. Pet. App. 22a – 26a and fn 4.

In addition, all the Courts of Appeals agree that a fair housing agency's need to expend resources for out-of-court remedial activities to counteract a defendant's discrimination is sufficient to establish Article III standing. As the Third Circuit (which petitioners characterize as a "strict approach" circuit) has explained:

> In deciding organizational standing questions after *Havens*, appellate courts have generally agreed that where an organization alleges or is able to show – depending on the stage of the proceeding – that it has devoted additional resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement.

Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers, 141 F.3d 71, 78 (3d Cir. 1998). The Sixth Circuit agreed with this assessment, observing that "the circuits generally agree that an organization meets Article III standing requirements where it can show that the defendant's alleged violations of the Fair Housing Act caused it to divert resources from other projects . . . to combat the alleged discrimination." Pet. App. 16a. Out-of-court remedial

activities necessary to counteract a defendant's discrimination are sufficient to establish standing even in the circuits that petitioners characterize as taking stricter views of organizational standing. *See Louisiana ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2001) ("[A]n organization could have standing if it had proven a drain on its resources resulting from counteracting the effects of the defendant's actions."), *cert. denied*, 532 U.S. 904 (2001); *Fair Housing Council of Suburban Philadelphia*, *supra*, 141 F.3d at 78 ("where an organization alleges or is able to show – depending on the stage of the proceeding – that it has devoted additional resources to some area of its effort in order to counteract discrimination, the organization has met the Article III standing requirement."); *Spann v. Colonial Village, Inc.*, *supra*, 899 F.2d at 27 (D.C. Cir. 1990) ("*Havens* makes clear that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action.").

In this case respondent Fair Housing Council presented evidence of several out-of-court remedial activities, *see supra* pp. 6-7, that it believed were necessary to counteract WKB's non-compliant construction. The Court of Appeals expressly relied upon this evidence. Because there is no circuit court conflict on the question of whether a fair housing organization may establish standing based on the need to counteract a defendant's discrimination, the Council's standing in this case was determined on grounds on which all the circuits agree.

The petition asks this Court to resolve a conflict that does not apply to the facts at bar and should, accordingly, be denied.

B. WKB's Petition Mischaracterizes the Substantial Evidence of Agency Harm in this Case.

The evidence in this case suffices to prove standing under the standards of all circuits to have considered the question. In its attempt to suggest otherwise, WKB simply mischaracterizes the record below. Specifically, WKB asserts:

> There is no evidence in the record – not in any interrogatory response or deposition testimony – showing that FHC suffered some present tangible injury separate and apart from its costs to investigate and file this specific suit.

Pet. at 15. This statement conflicts squarely with the Sixth Circuit's findings (which the Petition nowhere directly challenges, likely because this Court does not grant review to correct allegedly erroneous factual findings in the lower courts). Specifically, the Sixth Circuit held:

> [W]e conclude that the Fair Housing Council set forth sufficient evidence to demonstrate that it *suffered an injury that is* both *independent of the instant litigation* and fairly traceable to the discriminatory actions of the Defendants.

Pet. App. 22a (emphasis supplied). The appellate court several times identified specific agency harms suffered

by FHC that were independent of the costs of litigation itself. Pet. App. 22a – 26a and fn 4.

Most notably, the Council conducted an extensive investigation of the Village of Olde St. Andrews. It visited and inspected the development; took and processed digital photos of the development; trained, supervised, and debriefed testers; conducted research into the ownership of the development; located and reviewed the original design plans and construction permits; and performed other tasks. Pet. App. 71a – 74a (Plaintiff's Responses to Defendants' First Interrogatories, No. 3); Pet App. 26a at fn 4. The Council determined that Olde St. Andrews was not accessible to persons with disabilities as required by the Fair Housing Act, and thereafter devoted additional resources to investigating WKB's other two developments, Greenhurst and Deer Creek, and determining that they too were non-compliant. *Id.*; *see also* Pet. App. 88a – 98a (Plaintiff's Responses to Defendants' First Interrogatories, No. 15).

FHC's Executive Director Tony Baize testified that the Council's work on WKB's non-compliant construction "diverted resources away from other projects to focus on this investigation." Pet. App. 125a – 129a. Specifically, the Council diverted resources from its normal activities, including: conducting, attending, and speaking at fair housing seminars; providing tester training; providing advice and referral services to the public; publishing the *National Fair Housing Advocate* and other publications; and postponing an insurance testing project. *Id.*; *see also* Pet. App. 68a – 74a (Plaintiff's Responses to Defendants' First Interrogatories, Nos. 2, 3).

In addition, after discovering WKB's non-compliance, the Council initiated several new projects to undo the damage to its mission caused by the inaccessibility of WKB's many housing projects. Pet. App. 71a – 74a (Plaintiff's Responses to Defendants' First Interrogatories, No. 3). It increased the number of its presentations at local and regional events specifically focused on disability issues, conducted additional accessibility tests, and recruited more testers with disabilities. *Id.* Generally, instead of focusing its limited resources on education and outreach in traditional areas like race and familial status discrimination, the Council "got a lot more involved with accessibility and getting the word out about accessibility in new construction." Pet. App. 130a (Baize Dep. at 48-49, 72). Baize estimated that the total economic harm to the Council was around $60,000. Pet. App. 122a – 123a (Baize Dep. at 33-34).

Finally, WKB's non-compliant dwelling units frustrated the Council's corporate mission to educate the community about the non-discrimination requirements of the Fair Housing Act, and to ensure full access to persons with disabilities. Pet. App. 116a – 119a (Baize Dep. at 27-30). The construction of non-compliant units sent the opposite message to the community, *i.e.*, that persons with disabilities "cannot have access to this new house even though [we told them] they should have access to it." Pet. App. 123a – 124a (Baize Dep. at 34-35). *See also* Pet. App. 68a (Plaintiff's Responses to Defendants' First Interrogatories, No. 2). As the *Havens* Court observed, "that the alleged injury results from the organization's noneconomic interest in encouraging open housing

does not affect the nature of the injury suffered." *Havens Realty Corp.*, 455 U.S. at 380 n. 20.

In sum, contrary to petitioners' assertion (Pet. 15-16), both lower courts found concrete proof of harm other than litigation expenses.

C. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S ARTICLE III JURISPRUDENCE.

Petitioners devote several pages to the proposition that the decision below "dramatically expands" this Court's Article III standing jurisprudence and has the effect of conferring standing to virtually all fair housing organizations who spend time and money "to prepare lawsuits." Pet. 22 – 25. This is a transparent attempt to make this case appear to be a "taxpayer standing" case, such as *Flast v. Cohen*, 392 U.S. 83 (1968); *Daimler Chrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006); *Hein v. Freedom From Religion Foundation*, 127 S. Ct. 2553 (2007), or an environmental regulation case, such as *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Such cases all involve plaintiffs invoking their status as "taxpayers" or individuals[10] seeking to challenge the legality of some government action or inaction. In contrast, the case at bar involves a dispute between private parties, one of whom offered evidence of tangible harm to its operational activities; standing

[10] To the extent there were organizational plaintiffs involved in these cases, their standing was based solely on their representative capacity on behalf of their members, and not, as here, on any harm directly to their institutional interests.

here is governed by *Havens*, and, as shown, that test is easily satisfied.

Unlike *Flast* and its progeny, *Havens* is the progeny of a long line of fair housing standing cases going back to *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); and *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). Judge (now Justice) Ginsburg clearly distinguished the type of agency harm found in *Havens* from those suits "presenting only abstract concerns or complaints about government policy or conduct." *Spann v. Colonial Village, Inc.*, 899 F.2d at 30:

> The ideological or undifferentiated injury cases, unlike this case, characteristically are suits against the government to compel the state to take, or desist from taking, certain action. Such cases implicate most acutely the separation of powers, which . . . is the 'single basic idea' on which the Article III standing requirement is built. The standing barrier, as it operates in undifferentiated injury cases, prevents the courts from interfering in questions that 'our system of government leaves . . . to the political processes.'
>
> Plaintiffs here do not seek to compel government action, to involve the courts in a matter that could be resolved in the political branches, or simply 'to vindicate their own value preferences through the judicial process. Plaintiffs are private actors suing other private actors, traditional grist for the judicial mill.

> Their suit does not raise the concerns that may arise when a public agency or officer is sued to achieve change in a government policy. To the extent that plaintiffs seek to vindicate values, those values were endorsed by Congress in the Fair Housing Act, the enforcement of which Congress specifically left in the hands of private attorneys general.

Id. at 30-31 (citations omitted).

Havens clearly and unequivocally held that a fair housing organization, like the Council, which shows "concrete and demonstrable injury to the organization's activities" suffers far more than simply a setback to abstract social interests. 455 U.S. at 379. *Havens* controls the Article III analysis in this context, not the taxpayer standing cases. Unlike the abstract injury claimed by taxpayers who seek to compel some governmental action, the concrete injury suffered by the Council here included the diversion of tangible assets to identify and investigate the defendant's discriminatory conduct, and the expenditure of resources to counteract the harm to the agency's corporate mission. *See supra* pp. 6-7.[11]

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[11] WKB highlights the fact that respondent Council was a recipient of HUD funding during 1997 and 1998, Pet. 4-6, and claims that the use of such funds for generic "tester funding" obliterates the Council's agency harm, Pet. 24-25. But, as noted above, the Council's standing is not limited to its pre-litigation investigation activities, but also includes out-of-court remedial activities. Moreover, the Council's HUD grants were not limited to "tester funding," and could have been used for a vast array of other activities. *See generally* Pet. App. 82a – 85a. As the Court of Appeals noted, if the Council had not expended resources on its

II. THE SIXTH CIRCUIT'S APPLICATION OF THE FAIR HOUSING ACT'S STATUTE OF LIMITATIONS IS CORRECT. IN ANY EVENT, IT WOULD BE PREMATURE TO ADDRESS THE ISSUE IN THIS CASE.

Petitioners ask this Court to address the Sixth Circuit's application of the Fair Housing Act's statute of limitations on the ground that it was "wrong." Pet. 25.

A. Review of This Issue Is Premature.

It would be premature for the Court to review this question. Although some district courts have applied the FHA's statute of limitations to design and construction cases differently in varying contexts, *see* Pet. 29, the decision below was the first on the subject by any Court of Appeals. Only one other Court of Appeals has addressed the issue since the court below issued its decision. In *Garcia v. Brockway*, 2007 U.S. App. LEXIS 22428 (9th Cir. Sept. 27, 2007), the Ninth Circuit recently held that the Act's statute of limitations begins to run upon completion of construction of a non-compliant dwelling, regardless of the date of actual injury to a potential victim. A petition for rehearing has been filed in that case and remains pending. Thus, the issue has yet to recur with sufficient frequency to establish a mature conflict among the circuit courts of appeals.

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investigation of WKB, it could have used the same funds for other purposes consistent with its corporate mission. Pet. App. 24a. In any event, HUD was not the only source of the Council's funding. It also had funds from other sources. Pet. App. 142a – 145a.

Moreover, the issue is of limited relevance to this case. Two of the three housing developments at issue here – the Village of Olde St. Andrews and the Village of Deer Creek – are not affected by the statute of limitations. They were still under construction when the action was commenced. The district court's final remediation order must be complied with as to those developments, regardless of the outcome of the Court's ruling on this issue. Certiorari would not be appropriate to address an issue that will have limited applicability or will not affect the course of the underlying litigation. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994); *Smith v. Butler*, 366 U.S. 161 (1961).

B. The Decision Below Is Correct.

Contrary to petitioners' suggestion, Pet. 30-32, the ruling below is not inconsistent with either *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), or *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007). Both of those decisions construed Title VII rather than the Fair Housing Act. Fair Housing Act cases are controlled by the statute of limitations holding of *Havens Realty*, which held that a claim challenging a "continuing violation" of the Act is timely filed if any of the defendant's unlawful behavior falls within the limitations period. 455 U.S. at 380-381. Where a plaintiff challenges not just one incident of unlawful conduct, but an unlawful *practice* that continues into the limitations period, the complaint is timely under the Act. *Id.* at 381.

The underlying rationales of *Morgan* and *Ledbetter* are consistent with *Havens* and with the Court of Appeals' decision below. In *Morgan* the Court held that

an unlawful discriminatory practice that continually affects the "conditions" of employment, such as a hostile work environment, is not barred by the statute of limitations so long as any act contributing to the hostile environment occurs within the limitations period. 536 U.S. at 116-117. In *Ledbetter* the Court emphasized that a statute of limitations does not begin to run until a cause of action "accrues," 127 S. Ct. at 2171 n. 3, which occurred in that case when the allegedly discriminatory act was "communicated to" the victim. *Id.* at 2169. According to *Ledbetter,* a cause of action accrues each time a discriminatory act occurs that is based on a "facially discriminatory pay structure," in contrast to claims that are based on "facially nondiscriminatory" pay systems. *Id.* at 2174.

The decision below is consistent with these principles. Like a "facially discriminatory pay structure" that triggers a new cause of action each time a paycheck is issued, a non-conforming dwelling unit is "facially discriminatory" against persons with disabilities,[12] and a new cause of action is triggered each time such a person attempts to buy or rent the dwelling. The Court of Appeals below was correct to focus on the date of last "sale or rental" of the facially discriminatory dwelling structure rather than on the date of its creation. Under *Havens*, because the last

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[12] "A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying 'No Handicapped People Allowed.'" *Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Senate Subcomm. on the Constitution of the Comm. on the Judiciary*, 100th Cong. at 25 (1987); *accord* 134 Cong. Rec. S19720 (statement of Sen. Harkin).

"sale or rental" of a dwelling unit at Greenhurst occurred within the limitations period, all 156 non-conforming units at Greenhurst are part of the same "continuing violation" of the Act and are subject to judicial remedy. Moreover, *Ledbetter* instructs that a cause of action based upon a non-conforming dwelling unit cannot "accrue" until an injury has actually been visited upon the plaintiff-victim; before that moment there is no cause of action. Here the Council first became aware in 1999 that the non-conforming units at Greenhurst existed and were frustrating its corporate mission, and immediately amended its Complaint to include them in the suit.

Petitioners contend that the Act's statute of limitations must commence immediately upon completion of construction, Pet. 27, regardless of when a potential renter or buyer might first be exposed to the inaccessible units, and regardless of the "unavailability" of the units to persons with disabilities years later.

There are several reasons why the statute of limitations in design and construction cases cannot begin to run on the date of completion of construction. First, there is the language of the Act itself. The limitations provision in the Act provides:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence *or the termination of an alleged*

> *discriminatory housing practice, . . . whichever occurs last . . . .*

42 U.S.C. §3613(a)(1)(A) (emphasis added). This language makes no reference to the date of design or date of construction, but instead refers to the "termination" of a discriminatory housing "practice." So long as a multi-family dwelling unit covered by the Act remains non-compliant and inaccessible to persons with disabilities, the discriminatory "practice" has not "terminated" within the meaning of the Act. *See Havens,* 455 U.S. at 380-381 (where a plaintiff challenges not just one incident of unlawful conduct, but an unlawful practice that continues into the limitations period, the complaint is timely filed).[13]

Second, to the extent there is any ambiguity on this issue, the Act must be given "a generous construction" so that the Act carries out a "policy of the United States that Congress considered to be of the highest priority." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). This mandate for a generous construction by a unanimous Supreme Court has

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[13] Petitioners gloss over the straightforward limitations language in the Act and instead focus on what they term the "more specific" building construction requirements of 42 U.S.C. §3604(f)(3) over the "more general" prohibitions on discrimination found in 42 U.S.C. §3604(f)(1). Pet. 26-28. But even a cursory review of the Act's structure reveals that the accessibility requirements set forth in §3604(f)(3) are merely illustrative "examples" of several kinds of behavior that constitute discrimination in the "sale or rental" of dwellings prohibited by §3604(f)(1). The limitations language must be construed to apply to the actual prescriptive language of §3604(f)(1), not merely the illustrations set forth in §3604(f)(3).

become the foundation for all subsequent judicial interpretations of the Fair Housing Act. *See Havens Realty Corp. v. Coleman*, 455 U.S. at 380 (unanimous recognition of "the broad remedial intent of Congress" embodied in the Act); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 (1995) (reaffirming *Trafficante*'s recognition of the Act's "broad and inclusive compass" and its entitlement to a "generous construction").

Third, the policy reason for statutes of limitations is not advanced by a "completion of construction" trigger. The purpose of statutes of limitation is to keep stale claims out of the courts. *Havens Realty Corp.*, 455 U.S. at 380. "Where the challenged violation is a continuing one, the staleness concern disappears." *Id.* In a non-compliant construction situation, the non-compliance is continuous, open, obvious, and easily determinable so long as the structure continues to remain non-compliant. There is no danger of stale evidence.

If the accessibility violations at Greenhurst are allowed to persist because construction of the dwelling units was "completed" more than two years prior to this litigation, WKB's construction will "effectively deprive disabled individuals of accessible housing." *U.S. v. Edward Rose & Sons*, 246 F. Supp. 2d 744, 754 (E.D. Mich. 2003), *aff'd*, 384 F.3d 258 (6th Cir. 2004). This could not have been the intent of Congress in enacting the design and construction provisions of the Fair Housing Amendments Act.

There is no substantial appellate conflict on the statute of limitations question, and a decision on the

issue will not resolve this case. Moreover, the Court of Appeals' ruling on this issue was correct.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 07-421

IN THE
SUPREME COURT OF THE UNITED STATES

WKB ASSOCIATES, INC.

Petitioner,

v.

FAIR HOUSING COUNCIL, INC.;
CENTER FOR ACCESSIBLE LIVING, INC.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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December 10, 2007

QUESTIONS PRESENTED

Under the Fair Housing Act, the "failure to design and construct" certain multifamily dwellings is unlawful discrimination against persons with physical disabilities. 42 U.S.C. § 3604(f)(3)(C). Respondents, public interest organizations, filed a civil action alleging that Petitioners built housing that does not comply with the Act's design and construction obligation.

1. Whether the injury in fact requirement for Article III standing is satisfied merely because a plaintiff incurred investigation and other pre-litigation expenses in preparation of filing the lawsuit.

2. Whether a continuing violation theory: (a) delays triggering the two-year statute of limitations in the Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A), until the date that the last unit in a housing development is sold or rented, regardless of when the unit was designed or constructed; or (b) allows suit against all prior sales of housing units, even if only a single sale occurs within the limitations period.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, WKB Associates, Inc., is a small business incorporated in the Commonwealth of Kentucky that is in the business of developing and building multifamily housing. No public company owns more than ten percent of its stock.

Respondents are the Fair Housing Council, Inc., and the Center for Accessible Living, Inc., which are Kentucky non-profit corporations concerned with issues of housing discrimination and the development of housing that is accessible to the physically disabled.

TABLE OF CONTENTS

Page (s)

QUESTIONS PRESENTED i

I. THE COURT SHOULD DECIDE THE QUESTION PRESENTED ON ARTICLE III STANDING 1

A. The Circuit Split is Resolute, on Whether Pre-Litigation Investigation Expenses Satisfy the Injury Requirement for Standing. 1

B. Aside From Costs Spent on Pre-Suit Investigation, Respondents Have Produced No Evidence of Injury 5

II. THIS COURT SHOULD DECIDE THE CORRECT TRIGGERING EVENT FOR THE FAIR HOUSING ACT'S STATUTE OF LIMITATIONS 8

CONCLUSION 13

TABLE OF AUTHORITIES

Page (s)

Cases

Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc., 522 U.S. 192 (1997) 12

Fair Hous. Council, Inc. et al v. Vill. Of Olde St. Andrews, Inc. et al., 210 Fed. Appx. 469, 2006 WL 3724128 (6th Cir. 2006) 1, 9

Fair Hous. Council of Suburban Phila. v. Mont. Newspapers, 141 F.3d 71 (3d Cir. 1998) 2

Garcia v. Brockway, 503 F.3d 1092 (9th Cir. 2007) 8, 9

Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 545 U.S. 409 (2005) 11-12

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 1, 2, 5, 7, 10

Hooker v. Weathers, 990 F.2d 913 (6th Cir. 1993) 3

Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) 11

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) .. 5

Spann v. Colonial Vill., Inc., et al., 899 F.2d 24 (D.C. Cir. 1990) 11

TABLE OF AUTHORITIES (*cont.*)

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988) 12

Vill. of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990) 8

STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 3604(a) 10

42 U.S.C. § 3604(c) 10

42 U.S.C. § 3604(d) 10

42 U.S.C. § 3604(f) 10

42 U.S.C. § 3604(f)(3)(C) 9

42 U.S.C. § 3613(a)(1)(A) 10

OTHER

Dash T. Douglas, *Standing on Shaky Ground: Standing Under the Fair Housing Act*, 34 Akron L. Rev. 613 (2001) 2

Webster's Encyclopedic Unabridged Dictionary of the English Language 970 (Random House 2001) . 4

I. THE COURT SHOULD DECIDE THE QUESTION PRESENTED ON ARTICLE III STANDING.

A. The Circuit Split is Resolute, on Whether Pre-Litigation Investigation Expenses Satisfy the Injury Requirement for Standing.

Respondents argue that Petitioner[1] "fabricate[d]" a conflict on the injury in fact requirement for Article III standing. Opp. 11. However, the court of appeals itself recognized that, in "[i]nterpreting *Havens*, the circuits courts *have reached varying conclusions* about the showing that an organization must make to demonstrate standing under the Fair Housing Act." App. 16a (emphasis supplied). It cited and discussed cases from other circuits regarding whether pre-litigation expenses provide the requisite concrete and particularized injury. Pet. 17-22. The court of appeals "highlight[ed] the different approaches," and acknowledged that "[t]he circuit courts differ" on the appropriate legal standard. *Ibid.* It considered the "more restrictive approach" (App. 16a-18a) championed by the Third, Fifth, Ninth and District of Columbia Circuits (App. 16a-18a), and then

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1 The court of appeals issued a judgment against WKB Associates, Inc., as well as the Village of Olde St. Andrews, Inc., and the Village appeared as a named-party in the caption of the order to be reviewed. *Fair Housing Council, Inc. et al. v. Village of Olde St. Andrews, Inc.* et al., 210 Fed. Appx. 469, 2006 WL 3724128 (6th Cir. 2006). However, Respondents are correct that the Village did not notice an appeal. Opp. 3, n. 2. To eliminate any confusion, WKB Associates is the sole petitioner.

catalogued the "more lenient approach" of the Second, Seventh, and Eighth Circuits. App. 18a-19a. The court of appeals announced it "falls into the latter group, taking a . . . lenient approach." App. 19a.

Likewise, the district court recognized that "[n]ot all circuits have reached the same conclusions" on organizational standing. App. 47a. Other circuits and the FHA literature also discuss the split on organizational standing. See, *e.g.*, *Fair Hous. Council of Suburban Phila. v. Mont. Newspapers*, 141 F.3d 71, 78-79 (3d Cir. 1998) ("[a] number of our sister courts have . . . adopted different views of whether the injury necessary to establish standing flows automatically from the expenses associated with litigation"); Dash T. Douglas, *Standing on Shaky Ground: Standing Under the Fair Housing Act*, 34 Akron L. Rev. 613, 626-631 (2001) (describing "liberal," "strict" and "middle-ground" interpretations of the *Havens* holding on organizational standing). Thus, it is well-accepted that a circuit conflict exists on the standing question presented.

Respondents further argue that Petitioner's use of the term "pre-litigation expenditures" is "unfair." Opp. 11. But again, the court of appeals and the district court both understood the issue as whether costs for pre-litigation testing and investigation satisfy Article III. The court of appeals stated, "the district court reluctantly found that the Plaintiffs' *prelitigation investigation expenses* related to the three testers . . . were sufficient to confer standing." App. 14a (emphasis supplied). As for itself, the court of appeals found that "*costs related to prelitigation investigation* can form the basis for standing." App.

19a (emphasis supplied). The district court explained the issue before it as follows:

> Defendants contend that the *pre-litigation investigation* in this case is just as 'manufactured' as the cost of the litigation itself, and will render the Article III requirements meaningless because any organization can create standing merely by 'investigating' the claim *before filing suit.* Defendants' argument has a good deal of appeal . . . . Here, it appears that Plaintiffs' investigation efforts were no more than *a necessary precursor of this litigation* . . . .
>
> * * *
>
> Although Defendants' arguments are very persuasive, the Court cannot ignore that in *Hooker* the Sixth Circuit found standing in a case very similar to the present. *See Hooker v. Weathers,* 990 F.2d 913, 915 (6th Cir. 1993). There, the only apparent allegation of injury was *pre-litigation investigation* expenses for testers who confirmed defendants' allegedly discriminatory conduct. *Id.,* 914-15.
>
> * * *
>
> If it were not for the *Hooker* opinion, the Court would almost certainly conclude that *pre-litigation investigation* in this case is insufficient to establish standing under Article III.

App. 54a-55a (emphasis supplied).

The thrust of Respondents' argument is that the investigation expenses they incurred *before* suing WKB satisfy Article III, and stand apart from the resources they spent *after* suing WKB. Opp. 11-13. Indeed, the court of appeals held that a plaintiff must "show some injury that is independent of the costs of litigation" but unlike other circuits, it "interpreted that standard narrowly, finding that *costs related to prelitigation investigation* can form the basis for standing." App. 19a (emphasis supplied). This is precisely the question presented in the petition: Do pre-litigation costs spent on investigation fulfill the injury requirement for Article III standing?

WKB submits that costs for testers and initial factual investigation which establish the very basis for a suit are not, as a matter of law, "independent"[2] from that suit. See Pet. 18-20 (citing opinions from the D.C., Third, Fifth, and Ninth Circuits, all requiring expenditure of resources "independent" of the lawsuit to satisfy Article III standing). The FHC's civil action against WKB could not have existed without the penultimate acts of testing; the lawsuit was contingent upon the prior factual investigation. Indeed, Respondents' formalistic insistence that pre-litigation investigation is not part of litigation defies their Rule 11 obligation, to undertake "an inquiry reasonable under the circumstances" to ensure their

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2 "Independent" means "... **3.** not influenced by the thought or actions of others; *independent research*. **4.** not dependent; not depending or contingent upon something else for existence, operation, etc. **5.** not relying on another or others for aid or support." *Webster's Encyclopedic Unabridged Dictionary of the English Language* 970 (Random House 2001) (original emphasis).

claims were "nonfrivolous" and that their "allegations and other factual contentions [had] evidentiary support . . . ." Fed. R. Civ. P. 11(b)(2), (3).

Only this Court can decide the contours of Article III. Respectfully, the petition should be granted to determine whether necessary pre-suit investigation into the defendant's conduct provide independent injury for a federal "case or controversy."

B. Aside From Costs Spent on Pre-Suit Investigation, Respondents Have Produced No Evidence of Injury.

Respondents are imprecise to assert that *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982), "controls the Article III analysis in this context . . . ." Opp. 20. It is the other way around; Article III controls the analysis, whether the plaintiff is a fair housing organization, a taxpayer, an environmental group, or any other litigant seeking to invoke the federal courts' limited jurisdiction. Accordingly, at this juncture, mere allegations of harm are inadequate. Respondents must set forth by affidavit or other evidence specific facts to satisfy standing prerequisites. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

Respondents attempt to conjure a question of fact on the nature of their injury. Their tactic is unavailing upon a contextual examination of their selective use of record excerpts. When asked to provide a "monetary value" for how much FHC had been injured, its corporate representative responded: "I don't know that I can." Baize Depo; App. 122a.

And while Respondents report that "the total economic harm to the Council was around $60,000," (Opp. 17), they neglect to inform it based that figure on:

> The time spent by staff members *on the case;* the outside consultants we brought in *on the case;* the materials that we used involved *in the case,* the testing fees; just anything that – anything that – any money we spent *on the investigation or litigation.*

Baize Depo.; App. 122a. (emphasis supplied).

Such pre-litigation investigation represents the *only* type of injury that Respondents sustained, as contained in the record and considered by the lower courts. Petitioner recognizes that the FHC conducted investigations at the Village of Olde St. Andrews. See Opp. 16 (site visits, inspections, research into ownership, reviewing plans and permits, taking photos, training and debriefing testers). The district court found that "the *only* actual evidence . . . in the record that supports Plaintiffs' allegation of investigation costs incurred prior to litigation" was their expenditures of about $150 on three testers to conduct "on-site accessibility tests" at Olde St. Andrews. App. 53a-54a. (emphasis supplied). The court of appeals decided such expenses were sufficient for Article III purposes: "the resources that the Fair Housing Council directed toward training and employing testers to investigate the Village of Olde St. Andrews constitutes a concrete injury." App. 26a. However, whether pre-litigation injury passes Article

III muster is the legal question for this Court to resolve.

The FHC tries to come within *Havens*, where the organization alleged that racial steering "frustrated" efforts to provide "counseling and referral services" for minorities seeking housing. *Havens*, 455 U.S. at 379. But *Havens* provides it no solace. That case found the organizational plaintiff *alleged* sufficient injury to survive a motion to dismiss, but at trial it needed to *prove* "it has indeed suffered impairment in its role of facilitating open housing." *Id.* at 379, n. 21. Here, the FHC has not proved it stepped-up any services for disabled home-seekers. It cites (Opp. 17) deposition testimony that the organization "got a lot more involved with accessibility . . . ." App. 130a; Baize Depo. at 48-49, 72. No quantum of evidence is offered to prove these bald statements. Respondents also claim to have "initiated several new projects to undo the damage" allegedly caused by WKB's developments, such as giving presentations, increasing accessibility tests, and applying for HUD enforcement grants. Opp. 17; App. 73a. Review of its proffered interrogatory response (App. 71a-74a) wholly lacks particularity on these putative projects. No facts are provided to flesh out the nature of any of these allegations, or why these activities are traceable to WKB's conduct.

Respondents also claim injury because they "diverted resources away from other projects." Opp. 16. Yet again, the underlying record provides no evidence to describe these lost opportunities with concreteness. In any event, the "lost opportunities" argument is merely the flip-side of the "pursuit of

litigation" coin. As the court of appeals stated, "every expenditure of money, time or other resources results in the loss of the benefit that would have resulted if the same time or money had been spent on something else." App. 24a. See also *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (deflection from housing counseling to legal efforts are "opportunity costs of discrimination, since although the counseling is not impaired directly there would be more of it were it not for the defendant's discrimination"). In other words, an organizational plaintiff can always point to some other activity it would have pursued if not for the expense of litigation. Like injury purportedly derived from pursuit of litigation, complaints about lost opportunities are a façade.

To conclude, Petitioner is correct that: "There is no evidence in the record—not in any interrogatory response (App. 67a-100a) or deposition testimony (App. 101a-153a)—showing that FHC suffered some present, tangible injury separate and apart from its costs to investigate and file this specific suit." Pet. 15.

II. THIS COURT SHOULD DECIDE THE CORRECT TRIGGERING EVENT FOR THE FAIR HOUSING ACT'S STATUTE OF LIMITATIONS.

The court of appeals mobilized a "continuing violation" theory to hold that that the FHA's limitations period starts upon the sale or rental of dwelling units. Pet. 26. While the petition was being prepared for printing, the Ninth Circuit issued a contradictory ruling on this point. In *Garcia v. Brockway*, 503 F.3d 1092, 1096 (9th Cir. 2007), the

court decided that the FHA's limitations provision is "triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued."[3] *Garcia* is discussed in more detail in the amicus brief of the National Multi-Housing Council, *et al.* Amicus Br. 14-15, 17-18. Significantly, the Ninth Circuit read the statute consonant with WKB's interpretation (Pet. 27): 42 U.S.C. § 3604(f)(3)(C) "is a coordinate section, not a subordinate section within (f)(1) . . . . [T]reating (f)(3)(C) as subordinate makes no structural sense." *Garcia*, 503 F.3d at 1096, n. 1.

Commencing the limitations period upon sale or rental creates tremendous practical difficulties. WKB's scenario regarding multiple sales, rentals, and subleases of housing units (Pet. 28) goes unaddressed by Respondents. Moreover, the position they advocate, that the court of appeals adopted, actually disserves the FHA's remedial goals. It makes little sense to conclude that sale or rental is the correct triggering event, when viewed against the fuller spectrum of housing discrimination acts outlawed by Section 804:

> (a) To refuse to *sell or rent* . . . or *otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin . . . .

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3 The *Garcia* dissent expressly noted the disagreement between the majority's opinion and the court of appeals' decision in this case. *Garcia*, 503 F.3d at 1104 (Fisher, J., dissenting) (citing *Fair Hous. Council v. Vill. of Olde St. Andrews*, 210 Fed. Appx. 469 (6th Cir. 2006)).

> (c) To make, print, or publish . . . any notice, statement, or advertisement . . . with *respect to the sale or rental of a dwelling* that indicates any preference . . . or discrimination based on race, color, religion, sex, handicap, familial status, or national origin . . . .
>
> (d) To represent to any person because of race, color, religion, sex, handicap, familial status or national origin that any dwelling *is not available* for inspection, *sale, or rental* when such dwelling is in fact so available . . . .
>
> (f)(1) To discriminate *in the sale or rental, or otherwise make unavailable or deny,* a dwelling to any buyer or renter because of a handicap . . . .

42 U.S.C. § 3604(a), (c), (d) and (f) (emphasis supplied). The Act's 2-year limitations period for civil actions governs all of these discriminatory acts. See 42 U.S.C. § 3613(a)(1)(A).

While the case at bench implicates only subsection (f)(1), it must be read in conjunction with those surrounding provisions. Each subsection within Section 804 covers specific acts of housing discrimination in the general context of "sale or rental" of dwellings. Under Respondents' logic, the limitations period pertinent to these discrete acts would commence only upon sale or rental of dwellings. Such an approach would subvert the FHA's goals. Unlawful housing discrimination frequently occurs *absent* sale or rental.

In *Havens*, for example, subsection (d) discrimination occurred upon the act of dissemination of false information on housing availability. Section 804(d) was violated when the realtor communicated the information, *regardless* of whether a sale or rental ever occurred. Likewise, in *Spann v. Colonial Vill., Inc., et al.*, 899 F.2d 24, 27 (D.C. Cir. 1990), the challenged act was the publication of discriminatory advertising under Section 804(c); the limitations provision ran from the date of publication, not from the date of any sale or rental of units portrayed in the illegal ads. Similarly, Section 804(a) has been interpreted to cover discriminatory land use actions by municipalities. This Court affirmed an FHA violation brought under subsection (a), where a town refused to amend an ordinance that perpetuated segregation by restricting low-income multifamily housing projects to a largely minority area. *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (*per curiam*). Under Respondents' reasoning, the statute of limitations would have never started to run in *Huntington Branch*, because the sale or rental of multifamily units would never have occurred following the town's decision to prohibit low-income housing.

The only reasonable construction of Section 804 against the limitations period in Section 813(a)(1)(A) is that the specific discriminatory action covered by each subsection triggers the start of the two-year clock—not the generic "sale or rental" of dwellings. The Court has "repeatedly recognized that Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a

complete and present cause of action.'" *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005), citing *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201 (1997). Moreover, in discerning the triggering event for the statute of limitations as applied to subsection (f), rules of construction dictate that the surrounding subsections must be considered. *See, e.g., United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme"). To ensure consistent interpretation with the other forms of discrimination made unlawful by Section 804, the underlying discriminatory act in subsection (f) that triggers the FHA's limitations period must be non-compliant design or construction of dwellings, *not* their sale or rental.

To conclude, the court of appeals' decision that sale or rental is the triggering event for limitations purposes conflicts with the Ninth Circuit, is unworkable as a practical matter, and cannot be reconciled with the FHA's text and structure. This Court should intervene to resolve the question.

CONCLUSION

For all of the foregoing reasons, and the reasons presented in the petition, the Court should grant certiorari.

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Respectfully submitted,

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